DUSTING OFF THE OLD PLAY BOOK: HOW THE
SUPREME COURT DISREGARDED THE BLUM
TRILOGY, RETURNED TO THEORIES OF THE
PAST, AND FOUND STATE ACTION THROUGH
ENTWINEMENT IN BRENTWOOD ACADEMY V.
TENNESSEE SECONDARY SCHOOL
ATHLETIC ASS’N

INTRODUCTION

Suppose Tom, a state employee, prohibits Mary, an antiabortion
protester, from picketing outside a building located on state-owned
property. Tom’s actions violate Mary’s Fourteenth Amendment
rights, which guarantee she will not suffer from discipline handed
down by a state without adequate protection of her due process
rights. However, if Bob, a private individual, attempts to prevent
Mary from conducting a similar protest outside a building that he
owns privately, the United States Constitution provides no relief for
Mary; Bob, not acting on behalf of the state, did not infringe on any of
Mary’s constitutional rights. Each of these hypothetical situations
represents an extreme end of the state action spectrum. Most scena-
rios, however, fall somewhere in the middle of the spectrum, where
the question of whether state action exists is blurred and the seem-
ingly private actor appears to act on behalf of the state.

In 1982, the United States Supreme Court defined the boundaries
of state action analyses in Rendell-Baker v. Kohn, Blum v. Yaretsky,
and Lugar v. Edmondson Oil Co., collectively referred to as the Blum
Trilogy. Through those cases, the Court introduced three principles
by which it analyzed state action claims: the symbiotic relationship

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1. See Fairfield Commons Condo. Ass’n v. Stasa, 506 N.E.2d 237, 245-46 (Ohio
1985).
2. Stasa, 506 N.E.2d at 245-46.
3. Id.
4. See G. Sidney Buchanan, A Conceptual History of the State Action Doctrine:
to a State Government, a High School Athletic Association Cannot Be Construed as a
State Actor—Brentwood Academy v. Tennessee Secondary Athletic Association, 180 F.3d
758 (6th Cir. 1999), cert. granted, 120 S. Ct. 1156 (2000), 10 SETON HALL J. SPORT L.
test, the public function test, and the state compulsion test.\textsuperscript{10} Under the symbiotic relationship test, state action existed when a close nexus between the state and a private entity resulted from joint actions or an interdependent relationship that transformed the private entity's actions into actions of the state.\textsuperscript{11} State action existed under the public function test when a private entity performed an action traditionally performed exclusively by the state.\textsuperscript{12} The state compulsion test revealed state action when the state coerced or encouraged a private entity to engage in the challenged conduct.\textsuperscript{13} Under these tests, state action only existed when a state became involved with a private party's actions.\textsuperscript{14}

As time passed, the Court modified its state action tests to focus on the state's relationship with the private entity, rather than the state's involvement in the action itself.\textsuperscript{15} Through its recent interpretations of the symbiotic relationship, public function, and state compulsion tests, the Court examined various factors that created state action.\textsuperscript{16} The Court no longer restricted its analysis of the modified tests to an examination of factors directly related to the challenged conduct.\textsuperscript{17} Nevertheless, the Court's state action doctrine still found its roots in the three tests, and state action resulted through analyses of those tests.\textsuperscript{18}

In \textit{Brentwood Academy v. Tennessee Secondary School Athletic Ass'n},\textsuperscript{19} the Supreme Court determined that the Tennessee Secondary School Athletic Association ("TSSAA") became a state actor when it imposed sanctions on Brentwood Academy.\textsuperscript{20} In finding state action, the Supreme Court noted that its analysis did not turn on any of the three enumerated tests from the \textit{Blum} Trilogy.\textsuperscript{21} Instead, the Court...

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\textsuperscript{12} Id. at 240.


\textsuperscript{15} Buchanan, 34 HOUS. L. REV. at 333, 346, 351, 388, 410, 665, 729-30, 758.

\textsuperscript{16} Id. at 578.

\textsuperscript{17} Edmonson v. Leesville Concrete Co., 500 U.S. 614, 621, 624-25 (1991) (discussing the state action tests and finding state action by applying the state compulsion and public function tests); Tedesco, 18 HASTINGS CONST. L.Q. at 253-54 (noting the Tarkanian analysis applied the symbiotic relationship test).

\textsuperscript{18} 531 U.S. 288 (2001).


\textsuperscript{20} \textit{Brentwood}, 531 U.S. at 302-03.
held that state action existed through the pervasive entwinement that existed between the State of Tennessee and TSSAA.\textsuperscript{22} The entwinement test examined the impact of the circumstances that surrounded the state's relationship with TSSAA.\textsuperscript{23}

This Note will first review the facts and holding of \textit{Brentwood}.\textsuperscript{24} This Note will then discuss the historical progression of the Supreme Court's state action doctrine by examining the \textit{Blum} Trilogy and cases decided before and after the \textit{Blum} Trilogy.\textsuperscript{25} Next, this Note will argue that the Court could have referred to more recent modifications of the traditional and more rigid symbiotic relationship, public function, and state compulsion tests because TSSAA was a state actor under modified versions of the state action tests.\textsuperscript{26} This Note will then criticize the Court for finding state action through entwinement and argue that the Court's reliance on entwinement was not a "new" state action test, but was instead a test that marked a return to state action theories that existed prior to the \textit{Blum} Trilogy.\textsuperscript{27} Finally, this Note will argue that by returning to theories of the past, the Court expanded its state action doctrine and lowered the standards that plaintiffs must meet when raising constitutional claims against seemingly private entities.\textsuperscript{28}

\section*{FACTS AND HOLDING}

Brentwood Academy, a private college-preparatory school located just outside Nashville, dominates the Tennessee high school football scene.\textsuperscript{29} While compiling a 310-43 record in twenty-eight years, Brentwood Academy's football team won at least seven Tennessee Secondary School Athletic Association ("TSSAA") high school championships and achieved national rankings in \textit{USA Today}.\textsuperscript{30} Brentwood Academy maintained a voluntary membership to TSSAA, a non-profit organization that organized state high school athletic tournaments.\textsuperscript{31}

\textsuperscript{22.} Id. at 291.
\textsuperscript{23.} Id. at 295-303.
\textsuperscript{24.} See infra notes 29-134 and accompanying text.
\textsuperscript{25.} See infra notes 135-526 and accompanying text.
\textsuperscript{26.} See infra notes 624-756 and accompanying text.
\textsuperscript{27.} See infra notes 781-828 and accompanying text.
\textsuperscript{28.} See infra \textit{Conclusion}.
\textsuperscript{31.} Brief for Respondent at 1, 5, \textit{Brentwood} (No. 99-901).
Thus, Brentwood Academy conducted its athletic programs as directed by TSSAA.32

Organized under Tennessee state law, TSSAA exists to stimulate and regulate the athletic relations among Tennessee's secondary schools.33 TSSAA's membership includes 290 public schools and 55 private schools; public schools account for 84% of TSSAA's voting membership.34 A nine-member Legislative Council comprised of high school principals and superintendents from member schools enacts and regulates high school athletics on behalf of TSSAA.35 Specifically, the Legislative Council regulates its members' recruiting activities.36 Although TSSAA's staff members do not receive a paycheck from the State of Tennessee, the state provides for their membership in a public retirement fund established for state employees.37

In 1925, the Tennessee State Board of Education ("Board of Education") officially recognized TSSAA by providing regulations, standards, and rules for interscholastic competitions that involved Tennessee's public schools.38 In 1972, the Board of Education officially designated TSSAA as an organization established to supervise and regulate interscholastic secondary school athletic activities in Tennessee's public schools.39 Later that year, the Board of Education approved TSSAA's rules and regulations but reserved the right to amend the official designation in the future.40 The Board of Education revoked the official designation in 1995 and therefore merely recognized TSSAA's role as an organizer of high school athletic events.41

32. Brief for Respondent at 1, Brentwood (No. 99-901).
34. Brentwood, 531 U.S. at 291.
36. Brentwood, 13 F. Supp. 2d at 670, 673. The court stated that the Legislative Council enacted TSSAA's rules and regulations and then the court recited TSSAA Recruiting Rule, Section 21, as a regulatory mechanism used by TSSAA to control its members' recruiting activities. Id. at 673-75.
37. Brentwood, 531 U.S. at 307 (citing TENN. CODE ANN. § 8-35-118 (1993)).
38. Id. at 292 (citations omitted).
39. Id. (citation omitted).
40. Brentwood, 13 F. Supp. 2d at 680 (citation omitted).
41. Id. at 681. The Supreme Court opinion stated that the rule was deleted in 1996, whereas the district court and Sixth Circuit opinions stated the rule was revoked in 1995. See Brentwood, 531 U.S. at 300 (stating the rule was deleted in 1996); Brentwood, 180 F.3d at 762 (stating the State Board of Education's official designation took effect from 1972 to 1995); Brentwood, 13 F. Supp. 2d at 680 (stating the State Board of Education revoked TSSAA's authority in April of 1995). Because the two lower courts both stated that the designation occurred in 1995 and because the district court opinion
The revision authorized public school membership in TSSAA but did not require membership among Tennessee's public schools.\textsuperscript{42} On August 23, 1997, TSSAA determined Brentwood Academy had violated section 21 of its Recruiting Rule ("Recruiting Rule 21"), which prohibited schools from unduly influencing prospective students in order to retain the student for athletic purposes.\textsuperscript{43} TSSAA accused Brentwood Academy of violating Recruiting Rule 21 by waiving the admission fees charged to student-athletes from other schools at athletic contests, writing letters to prospective students, and conducting off-season football practices.\textsuperscript{44} Accordingly, TSSAA placed Brentwood Academy's entire athletic program on a four-year probation.\textsuperscript{45} TSSAA also declared the boys' football and basketball teams at Brentwood Academy ineligible for post-season play for two years.\textsuperscript{46} Finally, TSSAA imposed a $3,000 fine on Brentwood Academy.\textsuperscript{47}

Brentwood Academy responded by suing TSSAA and its director, Ronnie Carter, in the United States District Court for the Middle District of Tennessee.\textsuperscript{48} Brentwood Academy alleged that Recruiting Rule 21 violated the school’s First Amendment right of free speech.\textsuperscript{49} Brentwood Academy's action also alleged that TSSAA had violated Brentwood Academy’s Fourteenth Amendment substantive and procedural due process rights as well as federal antitrust laws.\textsuperscript{50} Finally,
Brentwood Academy’s action included allegations that TSSAA had violated Tennessee state law in an unfair, unreasonable, and random manner. Brentwood Academy raised such allegations pursuant to 42 U.S.C. § 1983 ("Section 1983"), which requires that allegations of federal law violations contain references to action conducted under the color of state law. On June 1, 1998, Brentwood Academy moved for a permanent injunction and partial summary judgment, asserting that Recruiting Rule 21 violated the First and Fourteenth Amendments. Twenty-eight days later, the district court denied TSSAA’s subsequent motion for summary judgment on constitutional claims.

In reaching that decision, the district court noted that a symbiotic relationship existed between TSSAA and its member schools. The court reasoned that in Tennessee, only TSSAA organized high school athletic events and provided such services to the public. Additionally, the district court noted that TSSAA maintained the power to select officials for contests between TSSAA members. The district court noted TSSAA’s ability to sanction schools that violated TSSAA rules. The district court also commented that TSSAA generated a substantial amount of its yearly revenue from admission fees at tournaments involving TSSAA member schools. The court then cited the state’s inclusion of TSSAA employees in its retirement system as evidence of the symbiotic relationship.

The court granted summary judgment in favor of Brentwood Academy on its claim that TSSAA violated the school’s First Amendment rights. As a result, the court enjoined TSSAA from using the rule. The court also denied TSSAA’s motion for summary judgment.

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U.S. CONST. amend. XIV.

54. *Id.* at 678 (citation omitted). Brentwood Academy also claimed that Article VI of TSSAA’s Constitution violated the school’s Fourteenth Amendment rights to procedural due process. *Id.* (citation omitted). Twenty-nine days later, TSSAA filed a motion for summary judgment, claiming its entitlement to judgment as a matter of law regarding Brentwood Academy’s constitutional and state law claims. *Id.* (citation omitted).
55. *Brentwood*, 13 F. Supp. 2d at 670, 695.
56. *Id.* at 683.
57. *Id.* (citations omitted).
58. *Id.* (citations omitted).
59. *Id.* (citations omitted).
60. *Id.* at 670, 684 (citations omitted).
61. *Id.* at 683-84 (citations omitted).
62. *Id.* at 695.
63. *Id.* at 696.
on TSSAA's claim that it was not a state actor.64 The court reasoned that TSSAA was a state actor because its actions were so intertwined with the state that it acted on behalf of the state pursuant to § 1983.65 TSSAA responded by filing an interlocutory appeal, asserting that the district court erred when it classified TSSAA as a state actor.66 In its appeal, TSSAA further asserted that the recruiting rule did not violate Brentwood Academy's First Amendment rights even if TSSAA was a state actor.67

On appeal, the United States Court of Appeals for the Sixth Circuit reversed the district court's decision to grant summary judgment on Brentwood Academy's First Amendment claim, vacated the injunction, and remanded the case.68 Writing for a three-judge panel of the Sixth Circuit, Judge Ronald Lee Gilman concluded that TSSAA was not a state actor pursuant to § 1983.69 Judge Gilman reasoned as such because TSSAA was not so connected to the state that it acted on behalf of the state.70 The Sixth Circuit decision delivered by Judge Gilman differed from that of other circuits, which classified athletic associations as state actors.71

The Sixth Circuit applied the public function, state compulsion, and symbiotic relationship tests to examine the state action issue.72 First, the Sixth Circuit analyzed TSSAA's actions by applying the public function test.73 The Sixth Circuit defined the public function test as an inquiry into whether a private entity performed a function typically performed only by the state.74 The Sixth Circuit stated that the organization of school athletic events did not constitute a public function.75 The Sixth Circuit further reasoned that no constitutional right to participate in high school sports existed.76 Thus, the Sixth Circuit determined TSSAA was not a state actor according to the public function test because it did not engage in conduct traditionally reserved exclusively for the state.77

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64. Id. at 695.
65. Id. at 685.
66. Brentwood, 180 F.3d at 760.
67. Id.
68. Id. at 758, 760.
69. Id. at 766.
70. Id. at 762.
72. Brentwood, 190 F.3d at 763-66.
73. Id. at 763.
74. Id.
75. Id. (citations omitted).
76. Id. The court determined that other circuits addressing the issue held that no constitutional right existed to participate in high school athletic events. Id.
77. Brentwood, 180 F.3d at 763.
The Sixth Circuit then noted that TSSAA was not a state actor under the state compulsion test because TSSAA retained no authority from the Tennessee state legislature. According to the Sixth Circuit, a finding of state action through state compulsion required proof that the state coerced a private entity to act in a manner that transformed the private entity’s acts into actions of the state. The Sixth Circuit noted that the State of Tennessee had never specifically authorized TSSAA to organize high school athletic events. The Sixth Circuit also noted that the former designation placed on TSSAA by the Board of Education had not sufficiently turned TSSAA into a state actor because the Board of Education repealed that designation in 1995 and no longer required public schools to join TSSAA. The Sixth Circuit then determined the State of Tennessee had not acknowledged TSSAA in any manner that indicated the state encouraged or coerced TSSAA’s actions. Thus, the Sixth Circuit determined that TSSAA was not a state actor according to the state compulsion test.

Finally, the Sixth Circuit determined that TSSAA was not a state actor under the symbiotic relationship test. The Sixth Circuit noted that the symbiotic relationship test required a substantially close nexus between a state and the private entity’s challenged actions such that the private entity’s acts became those of the state itself. The Sixth Circuit commented that Brentwood Academy had not proven that the State of Tennessee controlled or directed TSSAA’s actions. Additionally, the Sixth Circuit noted that the State of Tennessee had removed its designation of TSSAA as organizer of high school athletic events. Therefore, the Sixth Circuit did not classify TSSAA as a state actor after examining the symbiotic relationship test.

Following the review of the public function, state compulsion, and symbiotic relationship tests, the Sixth Circuit concluded that Brentwood Academy had failed to prove TSSAA’s actions were fairly attrib-

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78. Id. at 764.
79. Id. at 763.
80. Id. at 764.
81. Id. (citing Jackson v. Metro. Edison, 419 U.S. 345 (1974)).
82. Id. at 763-64.
83. Id. at 764.
84. Id. at 764-66. The Sixth Circuit analyzed three former Sixth Circuit cases that examined whether high school athletic associations were state actors and determined those cases did not apply to TSSAA’s situation. Id. (citing Burrows v. Ohio High Sch. Athletic Ass’n., 891 F.2d 122 (6th Cir. 1989); Alerding v. Ohio High Sch. Athletic Ass’n., 779 F.2d 315, 316 n.1 (6th Cir. 1985); Yellow Springs v. Ohio High Sch. Athletic Ass’n., 647 F.2d 651, 653 (6th Cir. 1981)).
85. Brentwood, 180 F.3d at 764 (citation omitted).
86. Id. (citing Burrows, 891 F.2d at 125).
87. Id. at 764 (citing Alerding, 779 F.2d at 316 n.1).
88. Id. at 765-66.
utable to Tennessee. In its discussion of the issue, the Sixth Circuit also referred to footnote 13 of *National Collegiate Athletic Ass'n v. Tarkanian*, which indicated that organizations composed of mostly public institutions located in the same state and created by the same sovereign would most likely be considered state actors. In interpreting footnote 13, the Sixth Circuit commented that athletic associations did not generally act under the color of state law when relating to private institutions even if the challenged act constituted state action. The court then stated Brentwood Academy could not bring a § 1983 claim against TSSAA because it voluntarily maintained a membership in TSSAA, which was not attributable to the State of Tennessee.

Brentwood Academy petitioned for a rehearing *en banc* by the Sixth Circuit. Three judges from the Sixth Circuit denied Brentwood Academy's petition to rehear the case *en banc*, concluding that Judge Gilman had fully considered each issue when he originally heard the case on appeal. Even after reviewing Brentwood Academy's petition, which argued that Judge Gilman's prior opinion departed from circuit precedent, the judges considering the rehearing still denied Brentwood Academy's petition to rehear the case.

Judge Gilbert Merritt, joined by Judge Eric Clay, dissented from the Sixth Circuit's denial of rehearing *en banc*. Judge Merritt's dissent characterized the Sixth Circuit's decision as inconsistent with decisions of several other circuits that had previously classified high school athletic associations as state actors. Judge Merritt also commented that the Sixth Circuit's decision ignored the functional analysis of TSSAA's private activities and its cooperation with the State of Tennessee. Because the State of Tennessee delegated its authority to collect revenues at public athletic events, the dissent determined

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89. *Id.* at 766.
91. *Brentwood*, 180 F.3d at 766. In footnote 13, the *Tarkanian* Court indicated an athletic organization was a state actor when its membership consisted entirely of schools located in one state, all established by the same sovereign. *NCAA v. Tarkanian*, 488 U.S. 179, 193 n.13 (1988). However, the footnote then stated that the dissent agreed with the majority that if private universities composed a majority of the NCAA's membership, the NCAA would not act under the color of state law in its relationship with private universities. *Tarkanian*, 488 U.S. at 193 n.13.
92. *Brentwood*, 180 F.3d at 766.
93. *Id.*
94. *Brentwood*, 190 F.3d at 705.
95. *Id.* at 705-06. The opinion stated that Judges Guy, Suhrheinrich, and Gilman decided whether the Sixth Circuit should rehear the case, with Judges Merritt and Clay dissenting. *Id.* at 704, 706.
96. *Brentwood*, 190 U.S. at 705-06.
97. *Id.* at 706 (Merritt, J., dissenting).
98. *Id.* (Merritt, J., dissenting).
99. *Id.* at 707 (Merritt, J., dissenting).
that TSSAA had acted as an agent of the state that controlled a substantial portion of its educational programs.\textsuperscript{100} The dissent then noted the Sixth Circuit had created an unnecessary conflict among the circuits by refusing to rehear the case, in which it did not originally classify TSSAA as a state actor.\textsuperscript{101} Brentwood Academy filed a petition for writ of certiorari with the United States Supreme Court.\textsuperscript{102} The Court granted certiorari to determine whether a statewide organization established to regulate interscholastic athletic events among public and private high schools engaged in state action when it sanctioned a member school.\textsuperscript{103}

The United States Supreme Court cited the proposition advanced in Judge Merritt's dissent and reversed the Sixth Circuit's determination in a 5-4 decision upon determining that TSSAA was a state actor.\textsuperscript{104} The Court also remanded the case for further proceedings to review Brentwood Academy's First Amendment claim.\textsuperscript{105} Delivering the Court's opinion on the state action issue, Justice David Souter stated the case did not turn on analyses of the public function or state compulsion tests previously utilized by the Court.\textsuperscript{106} Instead, the Court reasoned that TSSAA's regulatory activities constituted state action because of the "pervasive entwinement" of Tennessee state school officials within TSSAA.\textsuperscript{107}

In finding state action through pervasive entwinement, the Court first reviewed its state action analysis in \textit{Tarkanian}, which indicated that an athletic association became a state actor when its membership consisted largely of public schools located within the same state.\textsuperscript{108} However, despite \textit{Tarkanian}'s anticipation of \textit{Brentwood}'s outcome, the Court in \textit{Brentwood} did not rely solely on the \textit{Tarkanian} Court's analysis as it reached a finding of state action through entwine-

\textsuperscript{100} Id. (Merritt, J., dissenting).
\textsuperscript{101} Id. at 706-07 (Merritt, J., dissenting).
\textsuperscript{104} \textit{Brentwood}, 531 U.S. at 290-91, 294 & n.1 (indicating four judges dissented and five judges joined the majority's opinion, which determined TSSAA was a state actor, a decision in line with those of other circuits); \textit{Brentwood}, 190 F.3d at 706 (Merritt, J., dissenting) (stating the Sixth Circuit incorrectly failed to follow precedent set by other circuits when it decided TSSAA was not a state actor).
\textsuperscript{105} \textit{Brentwood}, 531 U.S. at 305.
\textsuperscript{106} Id. at 290, 300 n.3, 303.
\textsuperscript{107} Id. at 291.
\textsuperscript{108} \textit{Brentwood}, 531 U.S. at 298. Footnote 13 in \textit{Tarkanian} stated that an organization would become a state actor if it consisted mostly of public schools located in the same state and created by the same sovereign. \textit{Id}. (citing \textit{Tarkanian}, 488 U.S. at 193 n.13).
The Court also did not rely on the traditional public function and state compulsion tests. The Court stated that Brentwood did not turn on analyses of the public function or state compulsion tests.

Instead, the Court held that state action existed because of "pervasive entwinement" in TSSAA's relationship with the State of Tennessee. According to the Court, entwinement existed where facts revealed a largely overlapping identity between a state and a private entity. In analyzing that overlapping identity, the Court noted that no one factor contributed to a finding of state action through entwinement. The Court indicated that entwinement was merely a descriptive term used to characterize the various criteria applied in state action analyses. In describing the entwinement analysis, the Court noted that state action existed through entwinement even when specific facts failed to satisfy requirements set by other traditional tests for state action.

The Court further commented that the pervasive entwinement of public schools and public officials in TSSAA's operations overshadowed TSSAA's status as a nominally private organization. Specifically, the Court noted that entwinement existed because (1) TSSAA's membership consisted mostly of public schools; (2) TSSAA's governing councils were composed entirely of representatives from Tennessee's public schools; and (3) TSSAA employees were eligible to receive retirement benefits from a fund established for Tennessee's public school teachers. After noting those facts, the Court stated that entwinement was evident in the public schools' relationships with

109. Brentwood, 531 U.S. at 298. The Court stated that dictum in the Tarkanian opinion presented facts similar to those presented in the Brentwood case but that the Tarkanian Court did not find state action. Id. (citing Tarkanian, 488 U.S. at 193 n.13). After referring to footnote 13 in Tarkanian, the Court reached a finding of state action through pervasive entwinement, which was not the basis of the Court's analysis in footnote 13 of Tarkanian. Id. See also Michael A. Culpepper, Note, A Matter of Normative Judgment: Brentwood and the Emergence of the "Pervasive Entwinement" Test, 35 U. Rich. L. Rev. 1163, 1179-80 (2002) (noting that the Brentwood Court found dicta in Tarkanian to be persuasive but it did not rely on Tarkanian to resolve the situation presented in Brentwood).

110. Id. at 300 n.3, 302-03.
111. Id. at 302-03.
112. Id. at 291.
113. Id. at 303.
114. Id.
115. Id. at 302-03. The Court noted that entwinement, as a term, referred to the types of facts that revealed state action by a private entity. Id. at 303.
117. Id. at 298.
118. Id. at 299-301.
TSSAA as well as the Board of Education’s relationship with TSSAA; both relationships revealed TSSAA’s public character.\(^{119}\)

Justice Clarence Thomas, joined by Chief Justice William H. Rehnquist and Justices Anthony Kennedy and Antonin Scalia, dissented and noted that before \(Brentwood\), the Court had never found state action through entwinement.\(^{120}\) According to Justice Thomas, TSSAA’s actions were not fairly attributable to the State of Tennessee because the state had not owned an interest in the high schools’ recruiting efforts.\(^{121}\) The dissent noted that the Court had previously found state action only in instances of a public function, state compulsion, or a symbiotic relationship.\(^{122}\)

In looking for a public function, the dissent stated that TSSAA was not a state actor because it had not performed a function that traditionally belonged solely to the state even though TSSAA served the public through its service to public schools.\(^{123}\) Justice Thomas’s dissent stated that TSSAA’s administration of athletic events was not a traditional function because the organization of such events did not occur until the twentieth century, even though high school athletes had competed long before that time.\(^{124}\) The dissent stated that TSSAA was organized as a private corporation and that the State of Tennessee did not create any organization to organize high school athletic events; as a result, the dissent commented that TSSAA did not perform a function that belonged to the State of Tennessee.\(^{125}\)

Next, Justice Thomas’s dissent indicated the State of Tennessee had not compelled TSSAA to enforce its recruiting rule.\(^{126}\) Justice Thomas’s dissent stated that the payment of membership dues to TSSAA had not depended upon TSSAA’s requirement that members comply with its recruiting rules.\(^{127}\) Subsequently, the dissent stated that TSSAA’s mere dependence on state funding did not create state

\(^{119}\) Id. at 302.

\(^{120}\) Id. at 290 (listing Chief Justice as William H. Rehnquist); Id. at 305 (Thomas, J., dissenting) (listing Clarence Thomas, Antonin Scalia and Anthony Kennedy as dissenting Justices and noting that the Court had never found state action through entwinement).

\(^{121}\) \(Brentwood\), 531 U.S. at 306, 308 (Thomas, J., dissenting).

\(^{122}\) Id. at 305 (Thomas, J., dissenting).

\(^{123}\) Id. at 308-09 (Thomas, J., dissenting).

\(^{124}\) Id. at 309 (Thomas, J., dissenting) (citing Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982)).

\(^{125}\) Id. at 310 (Thomas, J., dissenting).

\(^{126}\) Id. (Thomas, J., dissenting) (citing Blum v. Yaretsky, 457 U.S. 991, 1004 (1982) (noting that \(Blum\) explained the state compulsion test as one that examined the coercive power of the state as exercised either overtly or covertly in respect to a private entity’s conduct)).

\(^{127}\) Id. at 310 (Thomas, J., dissenting).
action by TSSAA if the funding did not affect the specific challenged act.128

Justice Thomas finally stated TSSAA and the State of Tennessee had not shared a symbiotic relationship that resulted in a state action.129 Justice Thomas noted that TSSAA had organized athletic tournaments in exchange for dues and gate receipts in a manner similar to that of a refreshment vendor who contracted with public schools but did not become a state actor by merely contracting with the state.130 The dissent further indicated that the state did not profit from TSSAA’s choice to enforce its recruiting regulation.131 In opining that TSSAA’s enforcement of Recruiting Rule 21 was not attributable to the State of Tennessee, the dissent determined that TSSAA was not a state actor.132 Finally, the dissent mentioned the majority’s failure to support its entwinement theory, stating that no precedent supported a finding of state action based solely on entwinement.133 The dissent claimed the majority never defined its entwinement test, and as a result, the ambiguity of the majority’s holding could affect other extracurricular activities such as cheerleading, math competitions, and forensics.134

BACKGROUND

A. APPLICATION OF THE ENTANGLEMENT THEORY BEFORE THE BLUM TRILOGY

Before the Court released Rendell-Baker v. Kohn,135 Blum v. Yaretsky,136 and Lugar v. Edmondson Oil Co.,137 (the “Blum Trilogy”), the Supreme Court had failed to develop consistent theoretical grounds for finding state action among private entities.138 The only constant element among the Court’s decisions insisted that each state action analysis sift through a collection of unique facts.139

128. Id. at 311 (Thomas, J., dissenting) (citing Blum, 457 U.S. at 1011; Rendell-Baker, 457 U.S. at 840).
129. Id. at 311-12 (Thomas, J., dissenting) (citations omitted).
130. Id. at 311 (Thomas, J., dissenting).
131. Id. (Thomas, J., dissenting).
132. Id. at 312 (Thomas, J., dissenting).
133. Id. (Thomas, J., dissenting).
134. Id. (Thomas, J., dissenting).
138. Thomas R. McCoy, Current State Action Theories, the Jackson Nexus Requirement, and Employee Discharges by Semi-Public and State-Aided Institutions, 31 VAND. L. REV. 785, 788 & n.19 (1978) (stating, in an article written before the Court released its Blum Trilogy in 1982, that the Court’s state action decisions were open to more than one interpretation).
139. McCoy, 31 VAND. L. REV. at 788.
ing the facts of each case, the Court considered all relevant circumstances surrounding the state's contacts with a private entity. No consistent bases of state action existed within the federal court system.

Then, in 1961, in *Burton v. Wilmington Parking Authority*, the United States Supreme Court held that a privately owned restaurant's discriminatory acts constituted state action in violation of the Fourteenth Amendment's Equal Protection Clause. The Court introduced the concepts of symbiosis and interdependence between a state and a private entity as indicators of state action. Additionally, the *Burton* Court employed a totality approach to determine the combined force of relevant contacts between a state and a private entity.

In *Burton*, an African-American sought injunctive relief in the Court of Chancery of Delaware, New Castle County, and asked the court to require the Eagle Coffee Shoppe, Inc., to serve African-Americans. The Wilmington Parking Authority ("Parking Authority"), a Delaware state agency, owned the building space leased by Eagle, which refused to serve an African-American customer solely because of his race. Eagle admitted refusing to serve the African-American solely because of his race, and all parties moved for summary judgment, claiming that no material facts were in dispute. However, the Parking Authority maintained that it never asserted its power over Eagle's operations.

The Chancery Court granted a declaratory judgment in favor of the African-American customer. The court noted that tenants had financed the portions of the state-operated building that housed the parking garage through the payment of their rents. The court also noted that such rental receipts constituted a significant portion of the financing available to operate the public facility. The court then

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144. *McCoy*, 31 Vand. L. Rev. at 808.
149. *Id*.
150. *Id* at 198-99.
151. *Id*.
152. *Id*. 
reasoned that the Parking Authority was obliged to enter into leases requiring lessees to honor constitutional equal protection laws.\textsuperscript{153}

The Parking Authority appealed the chancery court’s decision to the Supreme Court of Delaware, arguing that Eagle’s refusal to attend to the African-American customer constituted private action that did not fall under the auspices of the Fourteenth Amendment.\textsuperscript{154} The Supreme Court of Delaware reversed the chancery court’s decision, holding that Eagle had operated as a wholly private entity in conducting business.\textsuperscript{155} The court reasoned that the State of Delaware did not financially enable Eagle’s ability to operate as a business, nor did it place Eagle in its building to serve patrons of the garage.\textsuperscript{156} The court noted the Parking Authority had relied on its receipt of Eagle’s rent to subsidize the parking garage.\textsuperscript{157} However, the court stated that Eagle acted privately despite those circumstances.\textsuperscript{158} The customer filed a petition for writ of certiorari with the United States Supreme Court.\textsuperscript{159} The Supreme Court granted certiorari to consider whether a private party may become liable for its violations of the Fourteenth Amendment when it leased the property on which it operated from the state.\textsuperscript{160}

The United States Supreme Court reversed the Supreme Court of Delaware’s decision, holding that Eagle’s discrimination constituted state action.\textsuperscript{161} Justice Tom Clark, writing for the majority, reasoned the State of Delaware and Eagle had depended on each other so much that the state jointly participated in Eagle’s discriminatory actions.\textsuperscript{162} The Court further reasoned that Eagle’s discrimination was not so private that it fell beyond the scope of the Fourteenth Amendment.\textsuperscript{163} The Court reasoned as such upon noting the Parking Authority had relied on receipt of Eagle’s rent and long-term lease to secure capital for funding of its parking garage.\textsuperscript{164} The Court then noted that Eagle had similarly depended on the Parking Authority’s garage to provide convenient parking to its patrons.\textsuperscript{165} Because of Eagle’s location in a

\begin{footnotesize}
\textsuperscript{153} \textit{Id.} \\
\textsuperscript{155} \textit{Wilmington, 157 A.2d at 894, 902.} \\
\textsuperscript{156} \textit{Id. at 902.} \\
\textsuperscript{157} \textit{Id.} \\
\textsuperscript{158} \textit{Id.} \\
\textsuperscript{159} \textit{Burton, 365 U.S. at 715, 717.} \\
\textsuperscript{160} \textit{Id. at 721.} \\
\textsuperscript{161} \textit{Id. at 715, 724-26.} \\
\textsuperscript{162} \textit{Id. at 715-16, 724-25.} \\
\textsuperscript{163} \textit{Id. at 724-25.} \\
\textsuperscript{164} \textit{Id. at 719.} \\
\textsuperscript{165} \textit{Id. at 724.} 
\end{footnotesize}
state-owned facility, the Court noted that Eagle had benefited from its share of the Parking Authority's tax exemption.\textsuperscript{166}

However, the Court commented that such factual considerations did not necessarily classify Eagle as a state actor.\textsuperscript{167} Instead, the Court stated the combination of the parties' mutually conferred benefits, the integral nature of the restaurant's operation in a publicly owned facility, and the degree of state involvement in Eagle's discriminatory actions constituted a Fourteenth Amendment violation.\textsuperscript{168} The Court determined the state's interdependent relationship with Eagle constituted joint action in Eagle's discrimination against a patron, and that the discrimination constituted state action.\textsuperscript{169}

Justice John Harlan, joined by Justice Charles Whittaker, dissented, reasoning that Delaware law did not require Eagle to serve all patrons.\textsuperscript{170} Because the statute allowed Eagle to serve customers at its discretion, Justice Harlan stated the question of state action surfaced only when the lower court determined Eagle was not a state actor.\textsuperscript{171} Justice Harlan further opined that the Court should remand the case to the Delaware Supreme Court for clarification of its reasoning in the case or hold the case pending clarification from the state court.\textsuperscript{172}

Justice Felix Frankfurter also dissented, noting the majority's failure to determine the meaning of statutory provisions regarding a restaurant's ability to deny service to certain patrons.\textsuperscript{173} Justice Frankfurter referred to the majority's decision as premature, as it occurred without analysis of the relevant statutory provisions.\textsuperscript{174} Thus, Justice Frankfurter joined Justice Harlan's proposed remand but did not state his views regarding the state action question.\textsuperscript{175}

Nearly seven years later, in \textit{Louisiana High School Athletic Ass'n v. St. Augustine High School},\textsuperscript{176} the Fifth Circuit addressed state ac-
In *St. Augustine*, the Louisiana High School Athletic Association ("LHSAA"), which organized high school athletics for Louisiana's "white public schools," denied membership to St. Augustine High School, an all-African-American high school. St. Augustine responded by bringing suit against LHSAA in the United States District Court for the Eastern District of Louisiana to enjoin LHSAA from racially segregating its high school athletic system. St. Augustine claimed that the State of Louisiana maintained a racially segregated high school athletic system by allowing LHSAA to organize activities only among schools that educated white students. St. Augustine also claimed that those functions carried out by LHSAA were those normally carried out by the State of Louisiana and that LHSAA was a state actor as a result.

The district court declared LHSAA a state actor and stated that by the Fourteenth Amendment, LHSAA could not discriminate against member schools. The court noted that of the 400 schools belonging to LHSAA, 85% were public schools and only 15% were privately owned and operated. Although the court considered LHSAA a state actor because of the largely public composition of its membership, the court noted that membership was not the only factor that indicated LHSAA was a state actor.

The district court commented that LHSAA's reliance on state funding and resources contributed to its public nature. The court further noted that the State of Louisiana was both directly and indirectly involved in LHSAA activities by organizing events for the state's public schools, which trained and coached their sports teams. Upon noting that LHSAA regulated competitions and disciplined member schools, the court determined LHSAA maintained an

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178. *St. Augustine*, 396 F.2d at 225-26. At the time, the Louisiana Interscholastic Athletic and Literary Organization ("LIALO") organized athletic events among Louisiana's African-American high schools. *Id.* at 225. St. Augustine's application for membership was approved by the schools in its district, as required by the LHSAA Constitution, but was denied by LHSAA itself. *St. Augustine v. La. High Sch. Athletic Ass'n.*, 270 F. Supp. 767, 770 (E.D. La. 1967), *aff'd*, 396 F.2d 224 (5th Cir. 1968).
179. *St. Augustine*, 396 F.2d at 225 (stating that St. Augustine sought to enjoin LHSAA's segregation in its organization of high school athletic events); *St. Augustine*, 270 F. Supp. at 767 (noting that St. Augustine brought suit in the United States District Court for the Eastern District of Louisiana).
180. *St. Augustine*, 396 F.2d at 225.
182. *Id.* at 770.
183. *Id.* at 771.
184. *Id.* at 771-72.
185. *Id.* at 772.
186. *Id.* at 773.
The authoritative position over Louisiana's public schools. The district court concluded that LHSAA was a state actor because its contacts with the State of Louisiana were so closely connected with the state's public schools that LHSAA became an instrumentality of the state. LHSAA, therefore, was enjoined from denying membership to any high school eligible for membership and was also ordered to immediately grant membership to St. Augustine. LHSAA appealed the district court's decision to the United States Court of Appeals for the Fifth Circuit, claiming its activities did not constitute state action. The Fifth Circuit affirmed the district court's decision and declared the LHSAA a state actor. The Fifth Circuit reached that decision by applying the entanglement theory of state action, which examined the contacts that created the relationship between a state and a private entity.

Upon concluding that LHSAA was a state actor, the Fifth Circuit considered the largely public composition of LHSAA's membership to be relevant because principals from member public schools were state employees. Because those principals answered only to LHSAA regarding scheduling and participation in athletic events, the Fifth Circuit determined that LHSAA exercised great authority over state institutions. Additionally, the Fifth Circuit commented that LHSAA received funding from dues of its mostly public membership and gate receipts at events held mostly at state-owned facilities. The Fifth Circuit also stated that the Louisiana Teachers Retirement Act provided for retirement benefits for LHSAA staff. The Fifth Circuit then reiterated the district court's determination that the State of Louisiana was intensively and actively involved in interscholastic athletics.

Three years later in Lemon v. Kurtzman, the United States Supreme Court consolidated two district court cases, Lemon v. Kurtzman...
and DiCenso v. Robinson, in reviewing two state statutes that provided funding for parochial schools. The Supreme Court declared the two statutes unconstitutional because both fostered excessive entanglement between the government and religious organizations. Although the Lemon entanglement test focused on claims related to the Establishment Clause of the Constitution, it concentrated on the total impact of a state's relationship with a private entity just as the entanglement test for state action examined such contacts. In Lemon, the Supreme Court considered two separate claims that challenged the constitutionality of state funding provided to private schools. The Court evaluated the entanglement between church and state by examining the relationships between parochial schools and the States of Rhode Island and Pennsylvania. Specifically, the Court evaluated the excessive entanglement resulting from the states' decisions to subsidize teachers at private schools.

In Lemon(I), citizen-taxpayers in Pennsylvania brought suit against the Pennsylvania Superintendent of Public Instruction, the State Treasurer of the Commonwealth of Pennsylvania, and seven sectarian schools that received funding under the Pennsylvania Nonpublic Elementary and Secondary Education Act (the "Education Act") in the United States District Court for the Eastern District of Pennsylvania. The Education Act allowed the State Superintendent to contract with private schools wishing to purchase secular educational services. According to the Education Act, which was funded solely from state harness racing and horse racing proceeds, secular educational services included the instruction of a secular subject limited to courses in arithmetic, modern foreign languages, physical science, and physical education. Contracting schools received payment under the Education Act when students' standardized test scores attained a satisfactory level and teachers held state certification equivalent to

202. Id. at 606, 615 (noting in an Establishment Clause analysis, entanglement existed through a variety of contacts between the church and the state); Mercadal, 6 SPORTS LAW. J. at 118 (noting that the entanglement theory of state action examined the contacts of a relationship between the state and a private entity).
203. Id. at 606.
204. Id. at 615-22.
205. Id. at 622.
206. Id. at 622.
208. Id. at 35, 39.
209. Id. at 39-40.
that required of public school teachers.\textsuperscript{210} Additionally, the Education Act required the Superintendent's approval of all textbooks used by schools receiving funding under the Act.\textsuperscript{211} The plaintiffs sought to enjoin the Commonwealth's funding of private schools under the Education Act.\textsuperscript{212}

The defendants moved to dismiss the complaint for failure to state a claim upon which the court could grant relief.\textsuperscript{213} The court upheld the motion, reasoning that the plaintiffs' complaint lacked essential allegations and failed to state a claim pursuant to the First Amendment's free-exercise clause.\textsuperscript{214} In noting that the statute authorized the state to contract only for secular services in private schools, the court refused to classify the statute as an unconstitutional advancement of religion.\textsuperscript{215} Thus, the court dismissed the plaintiffs' complaint because the plaintiffs failed to state a claim under the First Amendment's free exercise clause.\textsuperscript{216}

In DiCenso, Rhode Island citizens and taxpayers sued Rhode Island's Commissioner of Education, Treasurer, and Controller in the United States District Court for the District of Rhode Island, claiming that the Rhode Island Salary Supplement Act (the "Salary Supplement Act") was unconstitutional as a violation of the First Amendment.\textsuperscript{217} Parents of parochial school students and teachers eligible for aid under the Salary Supplement Act were allowed to intervene on the side of the Commissioner.\textsuperscript{218} The act in question, the Salary Supplement Act, provided semi-annual payments to qualified educators to assist private schools in providing salaries capable of retaining qualified teachers.\textsuperscript{219} However, the Salary Supplement Act funded only those private school applicants who promised not to teach religious

\begin{itemize}
\item \textsuperscript{210} Id. at 40.
\item \textsuperscript{211} Id.
\item \textsuperscript{212} Id. at 38 (citation omitted).
\item \textsuperscript{213} Id. at 43.
\item \textsuperscript{214} Id. at 49.
\item \textsuperscript{215} Id. at 46.
\item \textsuperscript{216} Id. at 49. Judge William Henry Hastie dissented upon declaring that the statute primarily funded private schools. Id. (Hastie, J., dissenting). According to the dissent, state reimbursement of sectarian schools provided direct support of a religious enterprise. Id. at 51 (Hastie, J., dissenting). In his dissent, Judge Hastie then declared that except for Lemon, the individual taxpayers lacked standing under the First Amendment's free exercise clause and the establishment clause. Id. at 53 (Hastie, J., dissenting). Thus, Judge Hastie determined that Lemon demonstrated his standing to sue under the establishment clause. Id. at 54-55 (Hastie, J., dissenting).
\item \textsuperscript{217} DiCenso v. Robinson, 316 F. Supp. 112, 112-13 (D.R.I. 1970), aff'd sub nom. Lemon v. Kurtzman, 403 U.S. 602 (1971) (stating that taxpayers brought suit against Rhode Island's Treasurer and Controller); Lemon, 403 U.S. at 608 (noting that the taxpayers brought suit to have the Salary Supplement Act declared unconstitutional).
\item \textsuperscript{218} DiCenso, 316 F. Supp. at 113.
\item \textsuperscript{219} Id. at 114-15.
\end{itemize}
courses and use only education materials utilized by Rhode Island public schools.\textsuperscript{220} Additionally, the Commissioner of Education required private schools to submit information related to enrollment and total expenditures.\textsuperscript{221}

The district court determined that the Salary Supplement Act violated the First Amendment because it aided teachers at parochial schools.\textsuperscript{222} To determine the purpose and effect of the Salary Supplement Act, the district court utilized a two-part test.\textsuperscript{223} First, the court determined whether the government’s involvement in activities of religious institutions constituted excessive involvement in religious activities.\textsuperscript{224} Next, the court asked whether the government’s involvement continuously called for surveillance that created an excessive degree of entanglement.\textsuperscript{225} The court noted the potential for state subsidies to limit the freedoms of religious schools and held the Salary Supplement Act unconstitutional as a violation of the First Amendment’s establishment clause resulting in excessive entanglement between the government and religion.\textsuperscript{226}

In DiCenso, officials from the State of Rhode Island appealed the district court’s decision, as did teachers eligible for payments under the Salary Supplement Act and parents of parochial school students

\textsuperscript{220} \textit{Id.} at 114.

\textsuperscript{221} \textit{Id.} at 115.

\textsuperscript{222} \textit{Id.} at 112.


\textsuperscript{224} \textit{DiCenso,} 316 F. Supp. at 112, 120.

\textsuperscript{225} \textit{Id.}

\textsuperscript{226} \textit{Id.} at 121-22. The district court commented on the relationship between Rhode Island’s Catholic schools and the Church and then noted that the Bishop of Providence and his representatives controlled the allocation of funds among the state’s Catholic elementary schools. \textit{Id.} at 116. The court also commented that diocesan schools possessed religious characteristics that distinguished them from Rhode Island’s public schools. \textit{Id.} Because the diocesan school system served as an integral part of the Catholic Church’s religious mission, the district court determined that the Salary Supplement Act enhanced the caliber of secular education in Rhode Island’s Catholic grammar schools while greatly aiding a religious enterprise. \textit{Id.} at 112, 117-18. Judge Raymond James Pettine concurred in part, agreeing with the majority’s determination that the statute violated the Constitution. \textit{Id.} at 123 (Pettine, J., concurring). Judge Pettine stated he agreed with the majority’s emphasis on analyses of various statutory impacts on First Amendment values. \textit{Id.} at 123-24 (Pettine, J., concurring). However, Judge Pettine also dissented in part by stating that the Salary Supplement Act did not significantly support any religious endeavor. \textit{Id.} at 123 (Pettine, J., concurring). Judge Pettine also declared the Salary Supplement Act unconstitutional. \textit{Id.} (Pettine, J., concurring).
taught by subsidized teachers. In *Lemon*(I), associations of concerned Pennsylvania taxpayers and individual taxpayers in Pennsylvania appealed the district court's decision. Mr. Lemon also appealed as a citizen, a taxpayer, and a parent of a child attending a Pennsylvania public school. The United States Supreme Court granted the appeal in both cases to review the district court's decisions and determine whether state funding of parochial schools involved excessive entanglement that violated the separation of church and state.

The United States Supreme Court declared both statutes unconstitutional under the First Amendment's religious clauses. Chief Justice Warren Burger, writing for the majority, noted that the Court required statutes to maintain a secular legislative purpose that did not advance an excessive amount of government entanglement in religion. The Court concluded that the total impact of the state's relationship with the religious practices in both *Lemon*(I) and *DiCenso* involved an excessive amount of entanglement between religion and the government.

To determine the level of entanglement that resulted from the statutes, the Court analyzed the nature and purposes of the schools that benefited from financial aid, the nature of the aid provided to the schools, and the resulting relationship between the state and religious authorities. In examining the Rhode Island Salary Supplement Act, the Court noted the religious nature of the parochial schools and commented on the dangers imposed upon the notion of separation of church and state by the mere presence of religiously affiliated teachers in the schools. Additionally, the Court noted that individual parishes funded the schools, with parish priests controlling the appropriation of parish funds. Thus, the Court determined that entanglement existed between the government and religion in the state's

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230. *Id.* at 602, 606, 609. The cases were appealed directly to the United States Supreme Court; the Supreme Court heard the appeals, and referred to each party as Appellant and Appellee in its opinion. *Id.* at 602.

231. *Lemon*, 403 U.S. at 607, 609, 611.

232. *Id.* at 606, 612 (citing *Walz*, 397 U.S. at 668).

233. *Id.* at 613-14.

234. *Id.* at 615.

235. *Id.* at 615-17.

236. *Id.* at 617.
parochial schools because parochial school teachers could not easily remain religiously neutral, as required by the Salary Supplement Act. The Court also opined that enforcement of the Salary Supplement Act would require extensive government surveillance and would therefore result in excessive government entanglement.

In examining Pennsylvania’s Education Act, the Court noted that the statute’s restrictions and requisite surveillance created entanglements between the church and state. The Court stated that the Education Act directly funded schools affiliated with churches. Noting the obvious presence of the government through such funding, the Court determined that the Education Act created an intimate relationship between church and state.

Justice William Douglas, joined by Justice Hugo Black, concurred, agreeing that the statutes had created an entanglement between the church and the states of Pennsylvania and Rhode Island. However, Justice Douglas disagreed with the majority’s determination that entanglement existed through the monitoring of private school activities by state authorities. Justice Douglas instead viewed the First Amendment violation through the taxpayers’ compelled contributions to parochial schools by paying their taxes. He agreed that entanglement existed but instead viewed the First Amendment violation through forced taxpayer contributions.

In Burton, St. Augustine, and Lemon, entanglement analyses focused on the totality of circumstances surrounding a state’s involvement with a private entity. The totality approach concentrated on the total impact of each of the contacts between the state and the private entity. By weighing the contacts and examining the complete impact of those contacts, the totality approach did not require any re-

237. Id. at 616, 618-19.
238. Id. at 606, 619.
239. Id. at 609, 620-21.
240. Id. at 609, 621.
241. Id. at 621-22.
242. Id. at 625, 627 (Douglas, J., concurring).
243. Id. (Douglas, J., concurring).
244. Id. at 641-42 (Douglas, J., concurring).
245. Id. at 627, 641-42 (Douglas, J., concurring).
246. Buchanan, 34 Hous. L. Rev. at 397 (stating that the Burton Court applied a totality analysis when conducting its state action analysis); Ralph D. Mawdsley, The Supreme Court and Athletic Associations: A New State Action Theory, 154 Educ. Law Rep. 981, 996 (2001) (stating that the entanglement theory examined all contacts between a state and a private entity); Mercadal, 6 Sports Law. J. at 118 (commenting that the St. Augustine court examined the total relationship between a state and a private entity).
lation between the state and the specific action challenged by the plaintiff.248

B. THE BLUM TRILOGY NARROWS APPLICATION OF THE STATE ACTION DOCTRINE

Before 1982, the United States Supreme Court examined relationships between states and private entities without limiting its examination to include only those contacts directly related to the challenged conduct.249 Such examinations focused on the total impact of all contacts between a state and a private entity.260 In 1982, however, the Court handed down decisions in Rendell-Baker, Blum, and Lugar, three opinions that redefined the contours of the state action doctrine.251 Through those cases, known as the Blum Trilogy, the Court introduced the symbiotic relationship, public function, and state compulsion tests.252 Those state action tests concentrated on the specific action challenged by the plaintiff.253 State action existed through a symbiotic relationship when a close nexus existed such that the private entity's actions automatically belonged to the state through joint participation or an exchange of mutual benefits.254 Under the public function test, state action surfaced when a private entity performed an action that traditionally belonged to the state.255 Under the state compulsion test, a private entity became a state actor when it acted in a manner coerced or encouraged by the state.256 The Blum Trilogy's interpretations of the tests indicated state action only resulted from analyses that focused on the challenged conduct.257 The new tests

248. Id. (stating the totality approach weighed and balanced facts); Ronna Greff Schneider, The 1982 State Action Trilogy: Doctrinal Contraction, Confusion, and a Proposal for Change, 60 NOTRE DAME L. REV. 1150, 1156 (1985) (stating that state action analyses did not require a tie to the specific challenged action before the Blum Trilogy's contraction of the state action doctrine in 1982).

249. Mercadal, 6 SPORTS LAW. J. at 118 (stating that in 1982, the Supreme Court moved away from its entanglement theory, which described the relationship between a State and a private entity to find state action); Schneider, 60 NOTRE DAME L. REV. at 1156 (commenting that before the Blum Trilogy, the Court had never examined direct government involvement in the challenged action).


253. Schneider, 60 NOTRE DAME L. REV. at 1156.


255. Id.

256. Id.

257. Schneider, 60 NOTRE DAME L. REV. at 1156.
proved to be limited in finding state action, as only Lugar resulted in a finding of state action.\textsuperscript{258}

The United States Supreme Court contracted the state action doctrine in Rendell-Baker and determined that a private school receiving public funding did not act under the color of Massachusetts state law even though the school relied heavily on state funding and conformed to various governmental regulations.\textsuperscript{259} As a part of the Blum Trilogy, the Rendell-Baker decision contracted the Court's state action doctrine such that the doctrine required a state's direct involvement in the private entity's challenged conduct.\textsuperscript{260} The Rendell-Baker Court defined the contraction through its analysis of the symbiotic relationship, public function, and state compulsion tests.\textsuperscript{261}

In Rendell-Baker, the New Perspectives School (the "school"), a non-profit private school for maladjusted teens, discharged five teachers and a counselor.\textsuperscript{262} Sheila Rendell-Baker, a vocational counselor, supported students who protested school decisions and created a controversy regarding the school's hiring council.\textsuperscript{263} The school's director, Sandra Kohn, asked for Rendell-Baker's resignation and then terminated her employment without notice when Rendell-Baker refused to resign.\textsuperscript{264} Kohn provided no cause for Rendell-Baker's termination.\textsuperscript{265} Rendell-Baker demanded reinstatement and then demanded a formal hearing to discuss her involuntary termination.\textsuperscript{266} The school replaced Rendell-Baker and refused to hold a hearing regarding the matter.\textsuperscript{267} Rendell-Baker responded by suing the school under 42 U.S.C. § 1983 in the United States District Court for the District of Massachusetts, alleging violations of her First, Fifth, and Fourteenth Amendment rights.\textsuperscript{268}

The district court ruled that the school's decision to terminate its employees did not involve a sufficient nexus that constituted state action by the school.\textsuperscript{269} Regardless of the significant state funding and

\footnotesize{\textsuperscript{258} Id. at 1153-54, 1156.  
\textsuperscript{260} Schneider, 60 NOTRE DAME L. REV. at 1156-57.  
\textsuperscript{261} Rendell-Baker, 457 U.S. at 840-43 (analyzing the coercive power, public function, and symbiotic relationship between the State and a private school); Schneider, 60 NOTRE DAME L. REV. at 1156-57 (stating Rendell-Baker was a part of the Blum Trilogy, which contradicted the state action doctrine).  
\textsuperscript{262} Rendell-Baker, 457 U.S. at 832-35.  
\textsuperscript{264} Rendell-Baker, 641 F.2d at 19.  
\textsuperscript{265} Id.  
\textsuperscript{266} Id. at 19-20.  
\textsuperscript{267} Id. at 19-20.  
\textsuperscript{268} Rendell-Baker, 457 U.S. at 834-35.  
regulations, the district court determined that state regulations did not directly relate to the termination of school employees.\textsuperscript{270} Furthermore, the court noted that regulations related to general matters concerning the school's operations had failed to reach a level of involvement that suggested a symbiotic relationship between the state and the school.\textsuperscript{271} Thus, the court determined that the ability to terminate employees belonged solely to the school and not the state.\textsuperscript{272} Accordingly, the court granted the defendant school's motion for summary judgment and dismissed the action.\textsuperscript{273}

In a separate proceeding in the United States District Court for the District of Massachusetts, five other former faculty members sued the school and its directors in response to their terminations.\textsuperscript{274} The terminations followed the teachers' decisions to form an organized labor group and publicly declare certain school policies unconstitutional.\textsuperscript{275} After plaintiffs brought suit regarding their terminations, the school filed a motion to dismiss and claimed it did not act under the color of state law.\textsuperscript{276} In regard to that matter, the district court reached a decision contrary to the one previously handed down in Rendell-Baker's case.\textsuperscript{277} In concluding that the school performed a public function, the court denied the motion to dismiss.\textsuperscript{278} However, the court certified its order for interlocutory appeal.\textsuperscript{279}

Rendell-Baker appealed the district court's decision to the United States Court of Appeals for the First Circuit, which consolidated the two cases after Appellees from the second case urged the court to do so.\textsuperscript{280} On appeal, Rendell-Baker and the plaintiffs from the second case asserted that the school was a state actor because it was sufficiently intertwined with the State of Massachusetts.\textsuperscript{281} Rendell-Baker also claimed that the school was a state actor when it removed her from her position, which was created and funded by the state through its Committee on Criminal Justice.\textsuperscript{282} The First Circuit re-

\textsuperscript{270} Rendell-Baker, 488 F. Supp. at 766.
\textsuperscript{271} Id. at 765 n.3.
\textsuperscript{272} Id. at 766-67.
\textsuperscript{273} Id. at 764, 767.
\textsuperscript{274} Rendell-Baker, 641 F.2d at 14, 16, 20-21. The record for the second action is comprised only of the complaint. Id. at 16. The First Circuit refers to the action as "Klug" on a few occasions and also refers to the action as Case No. 80-1451, but does not specifically include any citations to this action as it discusses the facts or holding of the action, nor does it provide any details related to the litigation. Id. at 16, 20-21.
\textsuperscript{275} Rendell-Baker, 641 F.2d at 21.
\textsuperscript{276} Id.
\textsuperscript{277} Rendell-Baker, 457 U.S. at 836.
\textsuperscript{278} Id. at 836.
\textsuperscript{279} Rendell-Baker, 641 F.2d at 21.
\textsuperscript{280} Id. at 14, 16.
\textsuperscript{281} Id. at 16, 21.
\textsuperscript{282} Id. at 21.
versed and remanded the district court's order in the second case, holding that the court erred in denying the motion to dismiss. The First Circuit reached that decision upon noting the claim relied solely on the overall relationship that existed between the school and the State of Massachusetts.

The First Circuit affirmed the district court's judgment with respect to Rendell-Baker's claim, reasoning that the school was not a state actor when it terminated her employment despite public funding and regulation. Instead, the First Circuit examined the parties' overall relationship by referring to Rendell-Baker's relationship with the school as one that benefited both parties but was merely contractual in nature. The First Circuit commented that the State of Massachusetts had not received any benefit from the specific challenged action, the school's termination of Rendell-Baker. Thus, the First Circuit declined to categorize the relationship between the school and the state as one that created mutual benefits and constituted state action.

The First Circuit then determined that the school's reliance on state funding did not indicate that the state controlled the school's operations. Instead, the court determined that such reliance only demonstrated the state's ability to potentially control operations at the school. Furthermore, the court determined that decisions regarding personnel matters were at the discretion of the school and its management, not the state or any of its agencies.

While it acknowledged that public school systems had assumed responsibility for educating children with special needs in recent years, the First Circuit declared that special education did not fulfill an exclusively public function. The First Circuit then stated that a state's choice to perform certain services did not in itself create a public function of that service. The First Circuit further commented that the school did not serve a public function toward its faculty, even if it performed such a function for its students. Consequently, the First Circuit determined that the state did not dominate the school in

283. Id. at 14, 27-28.
284. Id. at 16, 27.
285. Id. at 19, 25, 27-28.
286. Id. at 26.
287. Id. at 16, 26-27.
288. Id. at 26-27.
289. Id. at 24.
290. Id.
291. Id. at 25.
292. Id. at 14, 26.
293. Id. at 26.
294. Id. at 14, 26.
a manner that made all actions, including those related to its faculty, attributable to the state. Rendell-Baker and the other faculty members filed a petition for writ of certiorari with the United States Supreme Court. The Court granted certiorari to consider whether a private school that received mostly public funding and subjected itself to regulation by public authorities became a state actor when it terminated certain employees.

The Supreme Court affirmed the First Circuit's decision, holding that the teachers had not sufficiently claimed that the school acted under the color of state law when it discharged the teachers. Consequently, the Court found that the school was not a state actor when it discharged the faculty members. Chief Justice Warren Burger, writing for the majority, reached that decision by examining claims under three different approaches to the state action issue. Specifically, Chief Justice Burger analyzed Rendell-Baker's claim according to the state compulsion, public function, and symbiotic relationship tests.

The Court first determined that the nexus between the state and the school did not sufficiently merit a finding of state action because the state did not coerce the school's actions. The Court noted that typically, a state became responsible for private acts when it coerced or significantly encouraged the private entity's actions. The Court separated its coercion analysis into two parts: state funding and state regulation. The Court concluded the school's reliance on public funding for more than ninety percent of its budget did not reveal state

295. Id. at 14, 27.
298. Id. at 830, 835-37, 843.
301. Rendell-Baker, 457 U.S. at 840-41 (discussing whether the state's funding and regulation were coerced or significantly encouraged by the state); Schneider, 60 NOTRE DAME L. REV. at 1157, 1160 (noting the three approaches to the state action issue used by the Supreme Court).
302. Rendell-Baker, 457 U.S. at 840-41 (noting that the school's termination decisions were not compelled by state regulation or funding); Schneider, 60 NOTRE DAME L. REV. at 1160 (noting the Court divided the nexus test into a discussion of state funding and regulation).
304. Schneider, 60 NOTRE DAME L. REV. at 1160.
action, reasoning that public funding alone did not affect the school's employment decisions.\textsuperscript{305} The Court determined that the state's funding did not change the relationship between the school and its faculty because the school's receipt of funding did not depend on personnel decisions, nor did it affect such decisions.\textsuperscript{306}

In analyzing the second element of the coercion analysis, the Court stated that extensive regulation of the school's general activities did not create state action through its discharge of six employees because the regulations did not affect the discharge of those employees.\textsuperscript{307} The Court noted that the school was in no way required to discharge its employees in order to receive funding.\textsuperscript{308} The Court then referred to precedent, which indicated that government regulation did not necessarily constitute state action, even if such regulation was extensive and detailed.\textsuperscript{309} Thus, the Court stated that government regulation of the school did not influence the school's decision to terminate its employees.\textsuperscript{310}

In addition to not finding state action based on coercion, the Court rejected Rendell-Baker's argument that the school was a state actor because it performed a public function.\textsuperscript{311} The Court examined the public function doctrine by noting that state action existed when a private entity performed a function that only the state traditionally performed.\textsuperscript{312} According to the Court, a private entity that served the public did not necessarily become a state actor because only those functions that served the public both traditionally and exclusively constituted state action.\textsuperscript{313} In doing so, the Court noted that the education of troubled high school students was not within the state's exclusive province, for private entities educated such teens long before the state began funding the education of troubled teens.\textsuperscript{314}

Finally, the Court determined that the school did not act under the color of state law because it did not share a symbiotic relationship with the State of Massachusetts.\textsuperscript{315} The Court indicated that a symbiotic relationship existed when a private entity benefited from a

\begin{itemize}
  \item \textsuperscript{305} \textit{Rendell-Baker}, 457 U.S. at 840-41.
  \item \textsuperscript{306} \textit{Id.} at 841.
  \item \textsuperscript{307} \textit{Id.} at 834, 841-42 (stating that extensive regulation of the school did not create state action by the school when terminating faculty members); Schneider, 60 Notre Dame L. Rev. at 1160-61 (identifying extensive regulation as the second element of the nexus test for state action).
  \item \textsuperscript{308} \textit{Rendell-Baker}, 457 U.S. at 834, 841-42.
  \item \textsuperscript{309} \textit{Id.} at 841 (citing \textit{Jackson v. Metro. Edison Co.}, 419 U.S. 345, 350 (1974)).
  \item \textsuperscript{310} \textit{Id.} at 841-42.
  \item \textsuperscript{311} Schneider, 60 Notre Dame L. Rev. at 1163.
  \item \textsuperscript{312} \textit{Rendell-Baker}, 457 U.S. at 842.
  \item \textsuperscript{313} \textit{Id.} at 842.
  \item \textsuperscript{314} \textit{Id.}
  \item \textsuperscript{315} \textit{Id.} at 835, 842-43.
\end{itemize}
state's wrongful conduct.\textsuperscript{316} The Court stated no symbiotic relationship existed between the school and the State of Massachusetts.\textsuperscript{317}

Justice Byron White concurred and restated the question of state action as one concerning a private school's employment decisions amid subjectivity to state regulation and receipt of public funding.\textsuperscript{318} Justice White's concurring opinion commented that the critical factor in addressing state action was the absence of any allegations that claimed that the school's employment decisions were based on state policies.\textsuperscript{319} Noting, as the majority did, that state regulators displayed little interest in the school's personnel matters, the concurring opinion described the decision to discharge employees as private in nature, not one attributable to the state.\textsuperscript{320}

Justice Thurgood Marshall, joined by Justice William J. Brennan, Jr., dissented, reasoning that the substantial nexus between the school and the State of Massachusetts resulted in state action when the school terminated the faculty members.\textsuperscript{321} In noting that the majority's state action requirements were not sufficiently flexible and sensitive, the dissent commented that the school performed the statutory responsibilities of the state.\textsuperscript{322} Additionally, the dissent discussed the school's receipt of extensive government funding that accounted for over ninety percent of the school's annual budget.\textsuperscript{323} Such funding, noted the dissent, was contingent upon the school's compliance with regulations set by the Massachusetts Department of Education.\textsuperscript{324} Additionally, the dissent noted that the regulations required the school to report to the City of Boston and subject itself to inspection at any time to receive public funding.\textsuperscript{325} The dissent then concluded that the school acted so closely with the state in discharging its employees that its actions were attributable to the state.\textsuperscript{326}

The dissent agreed with the majority's determination that isolated occurrences of extensive state funding or regulation failed to constitute state action.\textsuperscript{327} It added, however, that the combination of elements could sufficiently constitute state action.\textsuperscript{328} The dissent

\textsuperscript{316} Id. at 842-43 (discussing Burton, 365 U.S. at 723).
\textsuperscript{317} Id.
\textsuperscript{318} Id. at 843-44 (White, J., concurring). Justice White's concurring opinion also applies to Blum v. Yaritzy. Id. at 843 (White, J., concurring).
\textsuperscript{319} Rendell-Baker, 457 U.S. at 844 (White, J., concurring).
\textsuperscript{320} Id. (White, J., concurring).
\textsuperscript{321} Id. at 844 (Marshall, J., dissenting).
\textsuperscript{322} Id. at 851-52 (Marshall, J., dissenting).
\textsuperscript{323} Id. at 846 (Marshall, J., dissenting).
\textsuperscript{324} Id. (Marshall, J., dissenting).
\textsuperscript{325} Id. at 846-47 (Marshall, J., dissenting).
\textsuperscript{326} Id. at 844, 847 (Marshall, J., dissenting).
\textsuperscript{327} Id. at 848 n.1 (Marshall, J., dissenting).
\textsuperscript{328} Id. (Marshall, J., dissenting).
noted that the presence of both funding and regulation created a close nexus between the state and the school. Thus, the dissent concluded that the school was a state actor because it existed solely to fulfill the state's educational obligations.

On the very day the Supreme Court decided *Rendell-Baker*, the Court also reached its decision in *Blum* and determined that a nursing home was not a state actor when it transferred nursing home patients from one facility to another without providing proper notice. In *Blum*, the Court set forth the symbiotic relationship, public function, and state compulsion tests as requirements for finding state action. However, after acknowledging the three principles, the *Blum* Court concluded that state action did not exist because the state was not responsible for the challenged conduct, the decision to transfer nursing home patients.

In *Blum*, nursing home patients sued Commissioners of the New York Department of Social Services and the Department of Health (the "Commissioners") in the United States District Court for the Southern District of New York both individually and on behalf of a class of nursing home patients eligible for Medicaid. The patients alleged that the Commissioners failed to adequately notify them of the Commissioners' decisions to transfer the patients to facilities that provided lower levels of health care. Following administrative hearings, the Commissioners decided to discontinue the patients' benefits unless they accepted transfers to a facility that provided a lower standard of care.

The district court found for the patients and granted a preliminary injunction that prevented the Commissioners from transferring patients without providing advance notice. The Commissioners filed a motion to amend the preliminary injunction and allow the

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329. *Id.* at 849 (Marshall, J., dissenting).
330. *Id.* at 850 (Marshall, J., dissenting).
332. *Blum*, 457 U.S. at 1005 (listing the three principles of state action analyses); Mawdsley, 154 EDUC. LAW REP. at 981-92 (stating *Blum* set forth the tests named the state compulsion theory, the public function theory, and the symbiotic relationship theory); Schneider, 60 NOTRE DAME L. REV. at 1177 (referring to the principles of state action as requirements).
333. *Blum*, 457 U.S. at 1010-12.
334. *Id.* at 995-96 (naming the parties to the litigation); Yaretsky v. Blum, 592 F.2d 65, 66 (2d Cir. 1979), *appeal after remand*, 629 F.2d 817 (2d Cir. 1980), and rev'd, 457 U.S. 991 (1982) (stating the appeal was taken from a decision handed down by the United States District Court for the Southern District of New York).
336. *Id.* at 995.
337. *Yaretsky*, 592 F.2d at 65-66. The district court opinion was referred to only as Yaretsky v. Blum, No. 76 Cir. 3360 (CBM) (S.D.N.Y. Jan. 10, 1978) and was discussed by the Supreme Court and the First Circuit. *Blum*, 457 U.S. at 991 (containing infor-
nursing home to notify state officials of transfers but withhold such information from patients if disclosure of that information became “medically contraindicated.”\textsuperscript{338} The district court denied the motion to amend the injunction and required the nursing home to abide by the notification procedures already in effect.\textsuperscript{339}

Pending the district court’s decision regarding that motion, the Commissioners appealed the district court’s decision to the United States Court of Appeals for the Second Circuit.\textsuperscript{340} In its appeal, the Commissioners argued that the district court erred in requiring nursing homes to notify patients of pending transfers and reductions in Medicaid benefits.\textsuperscript{341} The Second Circuit affirmed the district court’s decision to uphold the preliminary injunction.\textsuperscript{342} In affirming the decision, the Second Circuit acknowledged regulations that required state agencies to notify patients of pending transfers or reductions in benefits and noted that state agencies could not delegate their duty.\textsuperscript{343}

The Commissioners argued the transfer of a patient did not constitute state action if the patient’s doctor initiated the transfer.\textsuperscript{344} The Second Circuit determined that state action existed despite the state’s passive participation in the nursing home’s transfer decisions.\textsuperscript{345} The Second Circuit reasoned that state action existed when the nursing home transferred patients because of the close nexus that resulted from the nursing home’s relationship with the state.\textsuperscript{346} Specifically, the Second Circuit reasoned that transfer decisions of both private physicians and nursing homes had altered patients’ benefits.\textsuperscript{347} The Second Circuit then vacated the district court’s injunction to the extent it required state employees to read transcripts of hear-
ings related to transfer decisions. The Second Circuit reasoned that New York state law did not require such action by state employees. The Commissioners filed a petition for writ of certiorari to the United States Supreme Court. The Court granted certiorari to determine whether the State of New York became responsible for a private nursing home's decision to transfer patients when it did so without providing proper notice to those patients.

The Supreme Court reversed the Second Circuit’s decision, concluding that state action did not exist in the nursing home’s decision to transfer patients to different facilities. Justice William H. Rehnquist, writing for the majority, reasoned that the state’s response to the nursing home’s decisions to transfer patients had not imposed responsibility upon the state for such actions. The Court noted that Blum differed from other state action cases because in Blum, the defendant was not a private party and the challenged conduct did not result from a state official’s enforcement of state law. The Court stated that the patients actually challenged the transfers and alterations of benefits that resulted in the absence of proper notice. The Court distinguished the nursing home’s decision to transfer the patients from the state’s adjustment of benefits in response to the nursing home’s transfer decisions, which did not result from any actions or decisions of the state. The Court then indicated the state’s adjustment of benefits did not influence the nursing home’s transfer decisions because the state acted in response to the nursing home.

The Court identified three principles of state action analyses and referred to these principles as requirements of state action. First, the Court identified the symbiotic relationship test and noted state action occurred where a “sufficiently close nexus” existed between a state and a private entity's challenged action such that the state became responsible for the action. In discussing the symbiotic relationship test, the Court commented that the nursing home’s mere subjectivity to state regulation did not provide the sole basis for finding state action. The Court commented that the regulations re-

348. Id. at 822.
349. Id. at 820, 822.
351. Blum, 457 U.S. at 993-95, 998 (citation omitted).
352. Id. at 991, 998, 1012.
353. Id. at 993, 1011.
354. Id. at 1003-04.
355. Id. at 993, 1005.
356. Id. at 1005.
357. Id.
358. Id. at 1004-05.
359. Id. at 1004.
360. Id.
quired nursing homes to complete patient assessment forms and file those forms with proper state officials.\textsuperscript{361} The Court also noted the regulations did not authorize officials to approve or disapprove transfers.\textsuperscript{362} Noting that the state itself disclaimed such authorization, the Court commented that the state's adjustment of benefits in response to nursing home assessments did not constitute the state's consent of the transfers.\textsuperscript{363} The Court concluded that the slim degree of state involvement in the nursing home's decision to transfer patients did not constitute state action because the regulations were not so related to the nursing home's actions that the action became those of the state.\textsuperscript{364}

Next, the Court relied on the state compulsion test, which suggested states became responsible for private conduct only by exercising coercive power or significant encouragement over a private entity's actions.\textsuperscript{365} Upon acknowledging that state action also existed in the presence of state compulsion, the Court noted that a private entity's mere acquiescence to state regulations did not sufficiently justify a finding of state action.\textsuperscript{366} The Court determined the state's response to the nursing home's actions did not transform the decisions into actions of the state.\textsuperscript{367} After examining the statutes that directed nursing homes' decisions to transfer patients, the Court determined private physicians assessed patients' health and that state officials merely responded to such assessments without taking part in the nursing home's decision-making process.\textsuperscript{368} Thus, the Court reasoned the state was not responsible for the nursing home's decision to transfer patients because the nursing home's decisions were not reliant on any state regulations.\textsuperscript{369}

The Court then determined the nursing home was not a state actor according to the public function test, which indicates that a private entity becomes a state actor when it exercises powers traditionally belonging only to the state.\textsuperscript{370} The Court stated private entities that provide services not otherwise provided by the state were not necessarily state actors, even in the presence of extensive regulation.\textsuperscript{371} Thus, in noting the relationship of the state to the challenged action

\textsuperscript{361} Id. at 1010 (citations omitted).
\textsuperscript{362} Id.
\textsuperscript{363} Id.
\textsuperscript{364} Id.
\textsuperscript{365} Id. at 1004.
\textsuperscript{366} Id. at 1004-05.
\textsuperscript{367} Id. at 1005.
\textsuperscript{368} Id. at 1005-06.
\textsuperscript{369} Id. at 1008.
\textsuperscript{370} Id. at 1004-05.
\textsuperscript{371} Id. at 1011.
and not the private entity itself, the Blum Court concluded that the nursing home's decisions did not constitute state action and did not consequently violate the Fourteenth Amendment.372

Justice William J. Brennan, Jr., joined by Justice Thurgood Marshall, dissented, commenting that state action analyses required appraisals of the state's total involvement in the challenged actions.373 The dissent characterized the majority's decision as flawed and factually unfounded.374 The dissent referred to the majority's opinion as a departure from precedent that typically relied on abstract tests in lieu of an analysis of the relevant regulatory framework.375 The dissent determined that the majority failed to understand the state's decisive involvement in the private nursing home's decision to transfer patients.376

The dissent noted that the state's limit on spending controlled the challenged decisions more than the judgment of nursing home professionals.377 The dissent further commented that the state delegated its responsibilities of determining patients' needs to private nursing homes through state regulations.378 Thus, the dissent determined the state's involvement in the nursing home's actions extended to the state's provision of standards by which nursing homes must abide and therefore determined that the nursing home was a state actor when it transferred patients.379

Unlike the other two decisions of the Blum Trilogy, the Supreme Court reached a finding of state action in Lugar.380 In Lugar, the United States Supreme Court determined a creditor acted under the color of state law when he participated in prejudgment property attachment proceedings.381 The Court also determined that deprivation of property pursuant to a procedurally defective state statute created a cause of action pursuant to § 1983 as well as the Fourteenth Amendment.382 The Court reasoned as such by stating the requirements for finding state action under § 1983 paralleled those of the Fourteenth Amendment.383

372. Id. at 1011-12.
373. Id. at 1012-13 (Brennan, J., dissenting). Justice Byron White's concurring opinion, which applies to Blum, appears in full in Rendell-Baker. Id. at 1012 (White, J., concurring) (citing Rendell-Baker, 457 U.S. at 843).
374. Blum, 457 U.S. at 1014 (Brennan, J., dissenting).
375. Id. at 1013-14 (Brennan, J., dissenting).
376. Id. at 1014, 1028 (Brennan, J., dissenting).
377. Id. at 1014-15 (Brennan, J., dissenting).
378. Id. at 1018-19 (Brennan, J., dissenting).
379. Id. at 1019, 1029 (Brennan, J., dissenting).
380. Schneider, 60 Notre Dame L. Rev. at 1153-54.
382. Lugar, 457 U.S. at 941-42.
383. Id. at 935 & n.18.
In *Lugar*, a debtor sued a creditor under § 1983 in the United States District Court for the Western District of Virginia, alleging the creditor acted in concert with the state by attaining a prejudgment attachment of the debtor's property. The creditor attained the prejudgment attachment pursuant to a state statute that required creditors to allege their belief that a debtor might dispose of property to defeat the creditor in an *ex parte* petition. Acting upon that petition, the state court clerk issued a writ of attachment that the County Sheriff later executed. Although the debtor retained possession of his property, the Sheriff's execution of the writ sequestered the property.

In compliance with the statute, a state court held a hearing to determine the fitness of the attachment and levy proceedings. A state trial judge dismissed the attachment subsequent to the execution of the levy, reasoning the creditor failed to demonstrate a statutory basis for attachment. The debtor then sued in the district court, alleging that the creditor acted jointly with the state when it deprived him of his property without honoring his due process rights.

The district court held that the creditor's conduct failed to constitute state action pursuant to the Fourteenth Amendment. According to the district court, the creditor's self-help conduct was not attributable to the state because Supreme Court precedent indicated that similar self-help actions did not constitute state action. Furthermore, the district court noted the debtor failed to name public officials as defendants. Thus, the court held that the debtor's complaint failed to state a claim upon which relief could be granted under § 1983.

The debtor appealed the district court's decision to the United States Court of Appeals for the Fourth Circuit, arguing that the creditor acted under the color of state law pursuant to § 1983. The Fourth Circuit affirmed the district court's decision and held the debtor failed to allege that the creditor acted under the color of state

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386. Id.
387. Id. at 924-25.
388. Id. at 925.
389. Id. at 924-25.
390. Id.
391. Id.
392. *Lugar*, 639 F.2d at 1066.
393. Id. at 1066-67.
law as required under § 1983. The court agreed with the district
court's decision because the creditor's actions were not attributable to
the state. In assessing the debtor's claim, the Fourth Circuit stated
that analyses of § 1983 violations conducted under the color of state
law differed from violations resulting from state action. The
Fourth Circuit noted that § 1983 violations required an examination
of only the particular conduct as charged to the specific defendant.
However, state action claims required analyses of the total impact of
all actions depriving the plaintiff of its rights.

In applying its theory to § 1983 claims, the Fourth Circuit noted
the district court's failure to consider the presence of state and private
conduct in the taking of the debtor's property. The Fourth Circuit
determined that the state court clerk's overt involvement in the at-
tachment proceedings involved sufficient state action pursuant to the
Fourteenth Amendment. However, the Fourth Circuit held that
the debtor failed to state a claim under which state action existed
under § 1983 because the private creditor participated jointly with
state officials but did not corrupt the officials' powers or compromise
the officials' independence. Lugar, the debtor, filed a petition for
writ of certiorari with the United States Supreme Court. The
Court granted certiorari to review the Court of Appeals' decision,
which determined that deprivation of the debtor's property through
attachment proceedings did not constitute action under the color of
state law even though it resulted in state action.

The Supreme Court reversed the appellate court's decision, in
part, and affirmed the decision, in part, reasoning the creditor acted
under the color of state law by participating in the attachment pro-
cedings. Justice Byron White, writing for the majority, held that
due process requirements applied to proceedings related to prejudg-
ment attachments when state officials acted in concert with a private
creditor to secure property. Furthermore, the Court stated that if
such action resulted in state action, the conduct also resulted in action
under the color of state law in a manner that supported a § 1983

396. Id. at 1058, 1060-61, 1069-70.
397. Id. at 1061, 1067, 1069.
398. Id. at 1058, 1064-65.
399. Id.
400. Id.
401. Id. at 1058, 1061, 1067.
402. Id. at 1058, 1067.
403. Id. at 1058, 1060-61, 1069-70.
404. Id. at 1058.
405. Lugar, 457 U.S. at 922, 924, 926.
406. Id. at 922, 942.
407. Id. at 923, 925, 934-35.
Therefore, the Court determined the debtor had sufficiently stated a cause of action under § 1983 as well as the Fourteenth Amendment.

The Court examined two elements of a state action claim to determine whether the creditor's actions were fairly attributable to the state. First, the Court noted a deprivation of federal rights must result from the state's exercise of rights created by state regulations or by a person for whom the state assumes responsibility. Second, the Court noted that a party accused of depriving another of his rights must act on behalf of the state as a state official or through acts in concert with state officials. The Court stated the two elements merge when the defendant is a state official but diverge when the defendant is a private entity.

The Court determined that the debtor's loss of property did not result from actions contrary to privileges rooted in state authority. However, the Court noted that the private entity's joint participation with government officials in attaching property sufficiently characterized the entity as a state actor under the Fourteenth Amendment. The Court also noted that state action deprived the debtor of his property and that the creditor acted under the color of state law by participating in that deprivation.

Chief Justice Warren Burger dissented, stating the creditor's actions were not attributable to the state. Chief Justice Burger commented that invoking a judicial process implicated the state and its officials but stated that such invocation did not transform typically private actions into state actions. Chief Justice Burger also noted that no allegation of conspiracy between a private entity and state actors existed in Lugar.

Justice Lewis Powell, joined by Justices William H. Rehnquist and Sandra Day O'Connor, also dissented and categorized the majority's decision as unprecedented and implausible. Justice Powell noted that as state officials, the Virginia Sheriff and Court Clerk en-

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408. Id. at 935.
409. Id. at 924, 941-942.
410. Id. at 937.
411. Id.
412. Id.
413. Id.
414. Id. at 939-40.
415. Id. at 941-42.
416. Id. at 924, 942.
417. Id. at 943 (Burger, C.J., dissenting).
418. Id. (Burger, C.J., dissenting).
419. Id. at n.* (Burger, C.J., dissenting).
420. Id. at 943-45 (Powell, J., dissenting).
gaged in state action. However, Justice Powell also noted that the debtor did not bring suit against the Sheriff and Clerk as state officials. Justice Powell then stated the debtor did not allege that the state compelled the creditor's decision to resort to judicial means in taking the debtor's property. Thus, Justice Powell determined the creditor in the *Lugar* case did not meet the characteristics of action under the color of state law because the petitioner did not allege that the creditor hid behind the law or jointly participated with the state during the attachment proceedings.

C. APPLICATION OF THE STATE ACTION DOCTRINE FOLLOWING THE *BLUM* TRILOGY

In the years that followed the *Blum* Trilogy, the Court modified its state action tests. Although the Court continued to rely on the tests for analysis of state action claims, it modified the tests to weigh the significance of each contact between the state and a private entity's specific challenged conduct. The analysis, a combined examination of the specific challenged conduct and the totality approach, emphasized each contact equally and assessed the significance of all contacts combined in relation to the specific challenged conduct. The combined approach surfaced in *National Collegiate Athletic Ass'n v. Tarkanian* which modified the symbiotic relationship test and analyzed all factors that created a symbiotic relationship between the parties, not just those directly related to the challenged conduct. In *Edmonson v. Leesville Concrete Co.*, the Court further modified its state action doctrine and discarded the public function tests' exclusivity requirement. Through those state action decisions, the Court began its return to the totality approach of state action that prevailed before the Court released its *Blum* Trilogy.

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421. Id. at 943, 946 (Powell, J., dissenting).
422. Id. (Powell, J., dissenting).
423. Id. at 943, 955-56 (Powell, J., dissenting).
424. Id. (Powell, J., dissenting).
429. Buchanan, 34 Hous. L. Rev. at 758 (stating that the *Tarkanian* decision marked a return to the totality approach, which examined all contacts between the state and a private entity); Tedesco, 18 Hastings Const. L.Q. at 242-43 (noting that *Tarkanian* altered the symbiotic relationship test).
431. Buchanan, 34 Hous. L. Rev. at 388.
432. Id. at 758.
In *Tarkanian*, the Supreme Court determined the National Collegiate Athletic Association ("NCAA") was not a state actor when it represented its member schools as it investigated one public university, the University of Nevada, Las Vegas ("UNLV"). In *Tarkanian*, the Court modified the symbiotic relationship test by examining the combined effect of all factors related to UNLV's relationship with the NCAA. In doing so, the Court examined the nature of UNLV's compliance with NCAA rules rather than the extent of its participation in the NCAA's decision to suspend Coach Tarkanian. Thus, *Tarkanian* signified the Court's willingness to once again utilize the totality approach in analyzing state action claims.

In *Tarkanian*, then UNLV basketball coach Jerry Tarkanian ("Coach Tarkanian") sued UNLV and several of its officers in the Eighth Judicial District Court of the State of Nevada. Coach Tarkanian alleged that UNLV deprived him of his Fourteenth Amendment due process rights and violated 42 U.S.C. § 1983 when it followed NCAA orders and suspended him from his position as the men's varsity basketball coach. Coach Tarkanian also sought to enjoin the NCAA from enforcing his suspension. As the head coach at UNLV, Coach Tarkanian became "college basketball's winningest coach." However, a subsequent NCAA report listed thirty-eight NCAA rule violations committed by UNLV personnel, with Coach Tarkanian himself accused of committing ten such violations. As a result, the NCAA placed UNLV's men's basketball team on probation for two years and directed the university to suspend Coach Tarkanian or advise the NCAA why it should not impose additional penalties. UNLV responded to the NCAA's orders and notified Coach Tarkanian of its plan to suspend him from his position as basketball coach.

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434. *Tarkanian*, 488 U.S. at 193-99 (discussing all factors comprising the relationship between the NCAA and UNLV without specific regard to UNLV's decision to suspend Coach Tarkanian); Tedesco, 18 HASTINGS L.Q. at 242-43 (stating the *Tarkanian* Court modified the symbiotic relationship test).
436. Buchanan, 34 HOUS. L. REV. at 758.
441. *Id.* at 181.
442. *Id.*
443. *Id.* at 180-81.
Coach Tarkanian reacted to his planned suspension by bringing suit against UNLV and its officers in state court. The Nevada state trial court found in Coach Tarkanian's favor, granting him injunctive relief. The trial court reasoned UNLV and the NCAA denied Coach Tarkanian his procedural and substantive due process rights. UNLV, its regents, and president appealed to the Supreme Court of Nevada. The NCAA filed an amicus brief and suggested that the Supreme Court of Nevada dismiss the case for lack of an actual controversy. The NCAA also claimed it was a necessary party to the suit. The NCAA asserted that no actual controversy existed between Coach Tarkanian and UNLV and consequently argued the court should dismiss Coach Tarkanian's suit against UNLV. The NCAA argued alternatively that even if a controversy existed between Coach Tarkanian and UNLV, the state trial court exceeded its jurisdiction by hearing the case.

The Supreme Court of Nevada determined that an actual controversy existed and the NCAA should be joined to the litigation. Subsequently, the court reversed the trial court's decision and remanded the case to permit joinder of the NCAA as a party. In response, Coach Tarkanian filed a second amended complaint that included the NCAA as a defendant. The trial court granted injunctive relief to Coach Tarkanian. The court then classified the NCAA as a state actor. Furthermore, the court enjoined the NCAA from holding additional proceedings against UNLV. The NCAA appealed the injunctive order as well as the court's award of fees to Coach Tarkanian.

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444. Tedesco, 18 Hastings Const. L.Q. at 246.
446. Id.
447. Tarkanian, 594 P.2d at 1159-60.
448. Id. at 1160, 1162.
449. Tarkanian, 488 U.S. at 188.
450. Id.
451. Id.
452. Tarkanian, 594 P.2d at 1159, 1163. The court determined that an actual controversy existed because no evidence suggested UNLV would have reinstated Coach Tarkanian as head coach upon prevailing in court. Id.
453. Tarkanian, 594 P.2d at 1165. The court reasoned the litigation would affect either UNLV or the NCAA's protection of its interests. Id. at 1163.
454. Tarkanian, 488 U.S. at 188. The NCAA then removed the trial to Federal District Court, claiming that its joinder significantly affected the nature of the trial. Id.
456. Tarkanian, 741 P.2d at 1349.
457. Tarkanian, 488 U.S. at 188-89.
458. Id. at 189.
On appeal, the Supreme Court of Nevada affirmed the trial court's injunction with regard to Coach Tarkanian but reduced the award of attorney's fees. The court also classified the NCAA as a state actor. In reaching that decision, the Nevada Supreme Court observed that the ability to discipline public employees traditionally belonged only to the state. The court determined UNLV acted jointly with the NCAA by delegating its power to discipline employees to the NCAA. The court concluded state action resulted from the NCAA's relationship with UNLV. The NCAA filed a petition for writ of certiorari with the United States Supreme Court. The Court granted certiorari to consider whether a public university's compliance with NCAA orders constituted state action by the NCAA, a private organization that operated independently of any one state.

The United States Supreme Court reversed the Supreme Court of Nevada's decision and determined the NCAA was not a state actor. Justice John Paul Stevens, writing for the majority, commented that over 900 public and private universities located mostly outside the state of Nevada comprised the NCAA's membership. While member schools determined NCAA policies at annual NCAA conventions, a governing council implemented certain programs with help from various committees. The Court specifically noted the NCAA relied on its Committee on Infractions to impose penalties on schools that violated NCAA rules.

The Court then analyzed the NCAA's relationship with UNLV. The Court first commented that NCAA recommendations influenced UNLV's decision to suspend Coach Tarkanian from its basketball program. The Court assumed that the State of Nevada impacted the NCAA's policies, as UNLV worked with other member schools to promulgate NCAA rules. However, the Court determined that member institutions located outside the State of Nevada did not act under

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459. *Id.*
461. *Id.* at 1348.
462. *Id.* at 1349.
463. *Id.*
466. *Id.* at 193, 199.
467. *Id.* at 183, 193. The Court noted that UNLV, as a member of the NCAA that was a branch of the University of Nevada, was a state actor. *Id.*
469. *Id.*
470. *Id.* at 193.
471. *Id.*
472. *Id.*
the color of any state law when promulgating NCAA rules.\textsuperscript{473} Therefore, the Court indicated that the State of Nevada was not a source of the NCAA's rules.\textsuperscript{474} Instead, the Court determined that the membership of universities independent from any certain state provided the source for such rules.\textsuperscript{475} However, the Court indicated in footnote 13 that it would reach a different conclusion if a private entity's mostly public membership consisted of institutions created by the same sovereign and located within the same state.\textsuperscript{476} The Court then stated that because UNLV was just one member of an institution with members in multiple states, neither UNLV's promulgation nor its adoption of NCAA regulations constituted state action by the NCAA.\textsuperscript{477}

The Court rejected Coach Tarkanian's assertion that the NCAA was a state actor when its investigations, proceedings, and recommendations resulted from UNLV's delegation of power to the NCAA.\textsuperscript{478} Instead, the Court noted that the NCAA could threaten to punish UNLV but could not directly discipline Coach Tarkanian or any other employee at UNLV.\textsuperscript{479} Thus, the Court classified the NCAA as a private actor when it represented all members in its investigation of just one public university because it did not enjoy any governmental powers that facilitated such investigations.\textsuperscript{480} Next, the Court determined the NCAA's acts were not fairly attributable to the State of Nevada and that the NCAA did not act jointly with the state in suspending Coach Tarkanian.\textsuperscript{481} Stressing the antagonistic nature of the NCAA's relationship with UNLV, the Court noted that the two were not interdependent.\textsuperscript{482} Instead, the Court classified the NCAA as a private actor in disagreement with the state.\textsuperscript{483}

Justice Edward White, joined by Justices William Brennan, Thurgood Marshall, and Sandra Day O'Connor, dissented and stated the NCAA acted jointly with UNLV in suspending Tarkanian.\textsuperscript{484} In light of the NCAA's actions, the dissent determined the suspension

\textsuperscript{473} Id.
\textsuperscript{474} Id. However, in footnote 13, the Court stressed that a state could provide the only source of an organization's rules if all member schools were located in the same state and were generated by the same sovereign. Id. at 193 n.13.
\textsuperscript{475} Tarkanian, 488 U.S. at 193-94 (citing Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 501 (1988)).
\textsuperscript{476} Id. at 193 n.13.
\textsuperscript{477} Id. at 194.
\textsuperscript{478} Id. at 195-96.
\textsuperscript{479} Id. at 197.
\textsuperscript{480} Id. at 196-97.
\textsuperscript{481} Id. at 196 n.16, 197, 199.
\textsuperscript{482} Id.
\textsuperscript{483} Id. at 196.
\textsuperscript{484} Id. at 199 (White, J., dissenting).
constituted state action. The dissent reasoned the NCAA acted jointly with UNLV in suspending Coach Tarkanian because the two agreed the NCAA would hold hearings concerning violations. Because the parties agreed to take action jointly, the dissent commented that the potentially adversarial nature of UNLV's relationship with the NCAA still constituted state action. Thus, the dissent would have classified the NCAA as a state actor.

Nearly three years later, in *Edmonson v. Leesville Concrete Co.*, the United States Supreme Court determined that a private party in a civil case became a state actor by exercising his peremptory rights to reject potential jurors. Prior to *Edmonson*, the Court's public function test required proof that a private entity performed a function typically performed exclusively by the state. However, in *Edmonson*, the Court discarded the public function test's exclusivity requirement and reasoned that state action existed when a private litigant performed a traditional state function. The Court did not analyze the public function test in an isolated manner, but instead considered the test as just one factor of a state action analysis.

In *Edmonson*, Thaddeus Edmonson, an African-American construction worker, sued Leesville Concrete Company ("Leesville") for negligence in the United States District Court for the Western District of Louisiana. In that case, Leesville exercised three peremptory challenges to remove two African-Americans and one white from the potential jury pool. Edmonson requested that the court require Leesville to furnish a race-neutral explanation for its removals. The district court rejected Edmonson's request and the trial progressed with a jury comprised of eleven white jurors and one African-American juror. The jury returned a verdict in Edmonson's favor.

485. *Id.* (White, J., dissenting).
486. *Id.* at 199, 201 (White, J., dissenting).
487. *Id.* at 200-01, 203 (White, J., dissenting).
488. *Id.* at 199 (White, J., dissenting).
493. *Id.* at 388.
496. *Id.*
497. *Id.* In rejecting Edmonson's request, the district court noted Batson v. Kentucky, 476 U.S. 79 (1986) did not apply to civil proceedings. *Id.* (citing *Baston*, 476 U.S. 79 (1986)).
Edmonson appealed to the United States Court of Appeals for the Fifth Circuit, which remanded the district court’s decision after determining the litigants were state actors when they exercised peremptory rights. The Fifth Circuit noted the government participated in litigants’ peremptory challenges and cited federal statutes that granted litigants’ rights to exercise peremptory challenges in judicial proceedings. After commenting on the applicability of peremptory challenges within civil trial procedures, the Fifth Circuit determined that private litigants engaged in state action by exercising peremptory challenges.

The Fifth Circuit reheard the case en banc to determine whether the district court could require Leesville, a private party to a federal civil case, to explain its challenges when the rejected jurors and the opposing party were African-Americans. The court determined Leesville’s counsel was not a state actor by applying the two-step test presented in Lugar, which required that the action find its roots in governmental authority and that the action occur in the presence of a person characterized as a state actor. After stating that peremptory challenges rose without subjectivity to the court’s control in a manner that did not involve judicial discretion, the Fifth Circuit determined that state action did not surface through the exercise of peremptory strikes.

Edmonson filed a petition for writ of certiorari with the United States Supreme Court. The United States Supreme Court granted certiorari to determine whether a private litigant or that litigant’s attorney violates the Constitution by striking prospective jurors in a racially discriminatory manner.

The Supreme Court reversed the Fifth Circuit’s decision by holding that Leesville’s use of peremptory challenges constituted state ac-

499. Edmonson, 500 U.S. at 617.
501. Edmonson, 860 F.2d at 1314. Judge Thomas Gee dissented from the Fifth Circuit’s decision, asserting Leesville was not a state actor when it exercised its peremptory challenge rights as a private litigant. Edmonson, 860 F.2d at 1315 (Gee, J., dissenting). Judge Gee’s dissent commented that private counsel did not act on behalf of the state because only the judge acted on behalf of the government with minimal involvement in the proceedings. Id. at 1315-16 (Gee, J., dissenting).
502. Edmonson, 895 F.2d at 218-19.
503. Id. at 218-19, 221-22.
504. Id. at 218, 221-22. The dissent cited Lugar’s two-part test, but noted that state action required more than a private party’s actions in response to a statute. Id. at 227, 229 (Rubin, J., dissenting). In commenting that trial judges controlled every aspect of a litigant’s decision to exercise peremptory rights, the dissent determined that government involvement surfaced in the use of peremptory challenges. Id. (Rubin, J., dissenting).
505. Edmonson, 500 U.S. at 614.
506. Id. at 618 (citation omitted).
tion. Justice Anthony Kennedy, writing for the majority, reached that decision after following the same state action analysis presented in Lugar. According to Justice Kennedy, peremptory challenges occurred through the exercise of governmental authority because such challenges maintained little significance when removed from a court of law. Thus, the Court determined Leesville's exercise of its peremptory challenge rights met the requirements of the first part of the Lugar two-part test for state action: whether the purported deprivation of federal rights resulted from actions of the state or from the state's exercise of rights created by state regulations.

In assessing the second part of the Lugar test, which examined whether the accused party acted on behalf of the state as a state official, the Court emphasized the importance of the extent to which a private actor relied on governmental assistance. The Court noted that in state action analyses, a determination of whether the claimed injuries resulted from unique incidents of governmental power became relevant. The Court asserted that state action surfaced when private entities employed governmental procedures through overt assistance of state officials. The Court determined state action existed in use of peremptory challenges because such conduct constituted a traditional function of the government. According to the Court, traditional functions appeared evident because peremptory challenges assisted in selecting juries, which were quintessential governmental bodies with no characteristics of a private actor.

Justice Sandra Day O'Connor, joined by Chief Justice William H. Rehnquist, dissented, reasoning that peremptory challenges represented private choices, not choices rooted in state action. Justice O'Connor recited the general rule that state action existed only when the government became responsible for the specific challenged conduct. Justice O'Connor then stated that a private entity became constitutionally liable for its actions when it carried the government's

507. Id. at 614, 616-18, 621.
508. Id. at 615, 620 (citation omitted).
509. Id. at 620.
510. Id. at 616, 620.
511. Id. at 621.
512. Id. at 621-22 (citation omitted).
513. Id. at 622 (citation omitted).
514. Id. at 624.
515. Id.
516. Id. at 615 (naming William H. Rehnquist as the Chief Justice); Id. at 631-32 (O'Connor, J., dissenting) (reasoning that peremptory challenges represented private choices, not choices rooted in state action).
badge of authority while representing the government in some manner.518

Justice O'Connor first disagreed with the majority's assertion that private parties exercised peremptory strikes with the government's overt participation.519 In asserting that judges merely excuse jurors when they acquiesce to the use of peremptory challenges, Justice O'Connor distinguished a judge's advisement of a juror's removal from the judge's overt encouragement of the removal.520 While Justice O'Connor acknowledged that judges participated in state action when they advised potential jurors of their removal, she stated judges did not assume responsibility for each juror's removal because they did not encourage the litigant's use of a peremptory strike.521 Thus, Justice O'Connor determined judges did not overtly participate in the litigant's decision to exercise his peremptory challenge rights.522

Next, Justice O'Connor disagreed with the majority's statement that the exercise of peremptory strikes constituted the performance of a traditional public function.523 Justice O'Connor commented the government allowed litigants to exercise peremptory rights at their discretion.524 Furthermore, Justice O'Connor noted the government provided the mechanism by which litigants exercised peremptory challenges, and that simply allowing litigants to use such rights did not constitute state action.525 Thus, Justice O'Connor determined the exercise of peremptory rights was not traditionally or exclusively a function of the government and that state action did not exist as a result.526

ANALYSIS

In Brentwood Academy v. Tennessee Secondary School Athletic Ass'n,527 the United States Supreme Court examined the state action doctrine and determined the Tennessee Secondary School Athletic As-

518. Id. at 631-32 (O'Connor, J., dissenting) (citing Tarkanian, 488 U.S. at 191).
519. Id. at 633 (O'Connor, J., dissenting).
520. Id. at 633-35 (O'Connor, J., dissenting).
521. Id. at 634-35, 638 (O'Connor, J., dissenting).
522. Id. at 633 (O'Connor, J., dissenting).
523. Id. (O'Connor, J., dissenting).
524. Id. at 638 (O'Connor, J., dissenting).
525. Id. at 637 (O'Connor, J., dissenting).
526. Id. at 638 (O'Connor, J., dissenting). Justice Antonin Scalia further dissented, stating the majority's decision prevented minority defendants from exercising racially motivated peremptory strikes to avoid trial before a biased jury. Id. at 644 (Scalia, J., dissenting). Justice Scalia noted that complicating a litigant's ability to exercise his peremptory rights caused justice to suffer. Id. at 644-45 (Scalia, J., dissenting). Thus, Justice Scalia classified the majority's decision as an overhauling of the state action doctrine. Id. (Scalia, J., dissenting).
sociation ("TSSAA") was a state actor. The Brentwood Court, relying on state action tests presented in Rendell-Baker v. Kohn, Blum v. Yaretsky, and Lugar v. Edmondson Oil Co. (collectively, the "Blum Trilogy"), determined that TSSAA was not a state actor according to the symbiotic relationship, public function, or state compulsion tests. Instead, the Court relied on pervasive "entwinement," a criterion that examined the relevant factors constituting the overlapping identities of TSSAA and the State of Tennessee.

The Court stated that finding state action through entwinement indicated that a private organization assumed a public character when its identity overlapped with that of a state organization. In doing so, the Court emphasized four contacts creating entwinement in Brentwood: the large percentage of pubic schools that composed TSSAA membership; the ex-officio members of the State Board of Education that served on TSSAA board; the availability of state retirement benefits for TSSAA employees; and the State's continuing recognition of TSSAA even after it removed its official designation of the organization. The Court concluded TSSAA's activities constituted state action because of the pervasive entwinement that existed between TSSAA and the State of Tennessee.

In Brentwood, the Court correctly determined TSSAA was a state actor. However, the Court did not need to create a new test; under National Collegiate Athletic Ass'n v. Tarkanian and Edmonson v. Leesville Concrete Co., which modified the traditional state action tests, the Court could have reached the same conclusion of state action. In creating the entwinement test, the Court emphasized the Blum Trilogy's rigid applications of the state action doctrine rather than the more recent and more lenient interpretations used in Tarkanian and Edmonson. The Court addressed the public function test as an inquiry into whether a private entity performed a func-

534. Id. at 302-03.
535. Id. at 298-302.
536. Id. at 291.
537. See infra notes 649-70, 702-12, 738-56 and accompanying text.
540. See infra notes 649-70, 702-12, 738-56 and accompanying text.
541. See infra notes 624-38, 680-96, 719-36 and accompanying text.
tion that traditionally belonged solely to the state, just as it did in the Blum Trilogy.\textsuperscript{542} However, in that discussion, the Court failed to note that the Edmonson public function test discarded the exclusivity requirement.\textsuperscript{543}

The Brentwood Court then correctly determined that the state compulsion test did not, on its own, lead to a finding of state action.\textsuperscript{544} However, such a determination should not cause the test to be overlooked.\textsuperscript{545} In Edmonson, the Court modified the state compulsion test and considered a government's coercion as one factor of the symbiotic relationship test.\textsuperscript{546} Finally, the Brentwood Court incorrectly disregarded an analysis of the traditional symbiotic relationship test.\textsuperscript{547} Although footnote 13 of the Tarkanian symbiotic relationship analysis provided the Court with a simple but salient justification for finding state action in Brentwood, the Court failed to base its finding of state action on the Tarkanian decision.\textsuperscript{548} Instead, the Court found state action through "entwinement," a criterion not previously applied by the Court.\textsuperscript{549} However, the "new" test was not really a "new" test for state action.\textsuperscript{550} The Court's "new" entwinement criterion, in actuality, more closely resembled the Court's state action theories that prevailed prior to the Blum Trilogy.\textsuperscript{551}

Before the Blum Court established the symbiotic relationship, public function, and state compulsion tests, the Supreme Court's state action analyses concentrated on the entanglement that resulted from the total impact of a state's contacts with a private entity.\textsuperscript{552} That totality analysis came to a halt in 1982, when the Court contracted its state action doctrine and required a government's direct involvement

\textsuperscript{542} Brentwood, 531 U.S. at 302-03.
\textsuperscript{543} Id.
\textsuperscript{544} Id. at 303.
\textsuperscript{545} See infra notes 546-51 and accompanying text.
\textsuperscript{547} See infra notes 548-51 and accompanying text.
\textsuperscript{548} Brentwood, 531 U.S. at 295-302 (discussing the Tarkanian decision and footnote 13, which indicated that state action would exist within an institution constituted solely of schools located in the same state, many of them public and created by the same sovereign); Michael A. Culpepper, Note, A Matter of Normative Judgment: Brentwood and the Emergence of the "Pervasive Entwinement" Test, 35 U. Rich. L. Rev. 1163, 1176 (2002) (characterizing Tarkanian's footnote 13 as a "salient justification for finding state action").
\textsuperscript{549} Brentwood, 531 U.S. at 291, 303, 305.
\textsuperscript{550} See infra notes 781-828 and accompanying text.
\textsuperscript{551} See infra notes 797-828 and accompanying text.
in the specific action challenged by the plaintiff. The Brentwood Court relied only on the rigid state action tests that evolved in the Blum Trilogy but did not need to limit its analysis in that manner, for the Court could have determined that TSSAA was a state actor by applying more recent interpretations of those same tests. Instead of applying those modified tests, however, the Brentwood Court found state action through the so-called "new" test of entwinement by examining the totality of circumstances created by all contacts between a state and a private entity. The entwinement test was not actually a "new" test because it merely recalled analyses that prevailed prior to the Blum Trilogy.

A. INTERPRETATIONS OF THE TRADITIONAL STATE ACTION TESTS

1. The Entanglement Theory

Before 1982, the Court employed an entanglement theory to analyze state action claims. "Entanglement," as an indicator of state action, described the nature of the contacts that created the state's relationship between a state and a private entity. That relationship resulted in state action as the Court examined the totality of circumstances surrounding the state's contacts with the private entity. In examining the circumstances creating entanglement, the Court emphasized significant state involvement and determined that entanglement existed where a private entity became sufficiently "like" the state. This theory was so broad that it did not require direct governmental involvement in the specific challenged conduct.

The entanglement theory surfaced in 1961, when the United States Supreme Court found state action in Burton v. Wilmington Parking Authority after examining the totality of the circumstances surrounding the state's involvement in a private restaurant's discrim-

554. See infra notes 624-756 and accompanying text.
556. See infra notes 781-828 and accompanying text.
559. Schneider, 60 Notre Dame L. Rev. at 1165-66.
561. Schneider, 60 Notre Dame L. Rev. at 1156.
In its entanglement analysis, the Burton Court noted that a state-owned parking garage provided parking for the private restaurant accused of discrimination and also noted that the restaurant provided the parking garage with a long-term lease that provided funding for the garage. Upon examining the total effect of the state's contacts with the restaurant, the Court determined that the state was sufficiently involved in the restaurant's discriminatory actions and that state action existed as a result.

In 1968, the Fifth Circuit applied the entanglement theory of state action in Louisiana High School Athletic Ass'n v. St. Augustine High School and determined that the Louisiana High School Athletic Association ("LHSAA") was a state actor. In applying the entanglement theory of state action, the Fifth Circuit examined a myriad of factors that comprised LHSAA's relationship with the State of Louisiana. Specifically, the Fifth Circuit noted LHSAA's largely public membership, its reliance on state funds, and the control exerted by LHSAA over many of Louisiana's public schools. The qualification of LHSAA employees in the state retirement fund for teachers also contributed to the Fifth Circuit's decision. After examining many of LHSAA's contacts with the State of Louisiana, the Fifth Circuit stated the state was actively involved in LHSAA activities.

The Supreme Court applied an entanglement theory twelve years later in Lemon v. Kurtzman, when it declared two statutes that promoted state contacts with private schools unconstitutional. In Lemon, the Court applied the entanglement test to analyze an Establishment Clause claim just as the Fifth Circuit applied the entangle-

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565. Id. at 715-17, 719, 724.

566. 396 F.2d 224 (5th Cir. 1968).

567. La. High Sch. Athletic Ass'n v. St. Augustine High Sch., 396 F.2d 224, 228 (5th Cir. 1968). See also Mercadal, 6 SPORTS LAW. J. at 114, 118 (commenting that St. Augustine featured an entanglement analysis of state action).

568. St. Augustine, 396 F.2d at 114-15, 118.

569. Id. at 227.

570. Id. at 228.

571. Id. at 228 (citing St. Augustine High Sch. v. La. High School Athletic Ass'n., 270 F. Supp. 767, 773 (E.D. La. 1967), aff'd, 396 F.2d 224 (5th Cir. 1968)).

572. 403 U.S. 602 (1971).

ment theory of state action in St. Augustine. Upon noting that such government involvement might threaten the separation of church and state, the Lemon Court determined that state governments had become so involved in parochial education that excessive entanglement existed. Like the Burton Court, the Lemon Court employed an entanglement analysis by focusing on the dynamics of a state’s contacts with a private entity. That analysis prevailed for decades but was replaced in 1982 by the Blum Trilogy’s rigid set of state action tests.

2. The Blum Trilogy’s Retreat From The Entanglement Theory

When the United States Supreme Court released the Blum Trilogy in 1982, it retreated from its use of the entanglement theory. The Blum Court determined that extensive state regulation and funding did not constitute state action in Rendell-Baker and Blum because the regulations and funding did not directly affect the specific challenged conduct. In doing so, the Court indicated it was no longer willing to examine a state’s total involvement with a private entity. Of the three cases that comprised the Blum Trilogy, only Lugar resulted in a finding of state action.

The Blum Court narrowed the state action doctrine and formulated three state action tests that resulted in state action only upon identifying a state’s involvement in the specific conduct challenged by the plaintiff. The three tests resulted in state action in only a limited and narrow set of circumstances. In using the symbiotic relationship test, the Court determined that state action existed through a state’s joint actions or interdependent relationships with a private en-

574. Compare Mawdsley, 154 EDUC. L. REP. at 996 (stating the Lemon Court applied an entanglement theory to examine multiple contacts between a state and a private entity), with St. Augustine, 396 F.2d at 227-28 (examining various contacts between the state and the private entity when evaluating the relationship between the two parties).
575. Lemon, 403 U.S. at 602, 609, 613, 622, 624-25.
576. Id. (finding state action through excessive entanglement); Burton, 365 U.S. at 715-17 (finding state action by examining the totality of circumstances surrounding the state’s involvement in a private entity’s actions); Jose R. Riguera, Note, NCAA v. Tarkanaian: The State Action Doctrine Faces a Half-Court Press, 44 U. MIAMI L. REV. 197, 219 (1989) (stating that the Court was more willing to consider the dynamics of a situation when analyzing state action claims presented before the Blum Trilogy).
577. Mercadal, 6 SPORTS LAW. J. at 118.
578. Id.
579. Id.
580. Id.
581. Schneider, 60 NOTRE DAME L. REV. at 1179.
582. Id. at 1156.
583. Id. at 1160.
tity such that the private entity's actions became those of the state.584 The public function test, on the other hand, revealed state action when a private entity acted in a manner reserved solely for the state.585 Under the state compulsion test, state action existed when a state compelled a private entity's actions.586 All three tests required that the state's involvement relate directly to the specific challenged conduct.587 By imposing such a rigid requirement on its state action analyses, the Court contracted its previously broad state action analyses and limited the circumstances in which state action existed.588

However, in Tarkanian and Edmonson, the Court modified the rigidities imposed by the Blum Trilogy's tests.589 Such new interpretations of the Blum Trilogy tests no longer required direct governmental involvement in the challenged action but instead examined the indirect involvement of the state in a private entity's challenged acts.590 Where the Blum Trilogy's symbiotic relationship test once examined a state's involvement in the challenged act, the Tarkanian Court's modified symbiotic relationship analysis examined the state's involvement with the private entity itself while noting the effect of that involvement on the private entity's challenged conduct.591 In Tarkanian, the Court's analysis focused on the manner in which a state benefited from the private entity's acts.592 The Tarkanian analysis thereby converted those private actions into actions of the state but did not require a direct tie between the state and the private entity's actions; the Tarkanian Court merely examined the combined weight of various factors related to the challenged conduct.593 By employing that analysis, the Tarkanian Court determined that the National Collegiate Athletic Association ("NCAA") was not a state actor because its actions were attributable to the NCAA's membership of over 900 schools located across the United States, not just to one

586. Id. at 240.
587. Schneider, 60 NOTRE DAME L. REV. at 1156.
588. Id. at 1166.
591. Id. at 346, 410.
592. Id.
593. Id. at 391, 401, 404-06 (introducing a state action test that focused on whether private action became fairly attributable to the state); David W. Dulabon, Note, First (Amendment) & Goal: High School Recruiting and the State Action Theory, 2 VAND. J. ENT. L. & PRAC. 219, 226 (2000) (defining the symbiotic relationship test as one focused on whether a private entity's acts became those of the state).
state. The Tarkanian Court also rejected the notion of state action upon noting that by its actions, the NCAA was in an adversarial position with the state. That opposition between UNLV and the NCAA that surfaced when the NCAA imposed sanctions indicated that the NCAA was not a state actor because it did not benefit from actions of UNLV or the state, nor did it act on behalf of the state.

Likewise, the Edmonson public function test analyzed the state's relationship with the private entity and then examined the impact of that relationship on the private entity's conduct. The Edmonson public function test discarded the requirement that the private entity perform a function reserved exclusively for the state. As a result, the Edmonson public function test examined only whether a private act was one traditionally performed by the state; whether that action traditionally belonged only to the state was of no concern to the Edmonson Court.

The Edmonson Court also modified the state compulsion test by utilizing it as just one factor of a state action analysis that examined a state's involvement in a private entity's challenged conduct. The Edmonson Court examined the state action claim by asking whether the state coerced or encouraged a private entity to act in a certain manner. The Court, however, altered the test by including actions aggravated by the government. Without requiring direct coercion by the state, the Edmonson Court determined state action existed where the government merely allowed peremptory strikes to occur in an official forum. Such aggravation, however, did not reveal state action independently because the Edmonson Court applied the aggravation factor as just one point of contact between the state and the

595. Id. at 195-96.
596. Id. at 196.
597. Buchanan, 34 Hous. L. Rev. at 388.
598. Id.
599. Edmonson, 500 U.S. at 621 (stating that a state action examination concerns whether the act is traditionally a government function); Id. at 640 (O'Connor, J., dissenting) (noting that the state action test typically included an exclusivity factor); Buchanan, 34 Hous. L. Rev. at 388 (commenting that the Edmonson public function test did not require that a private act be one performed traditionally and exclusively by the state, only that the act be one traditionally performed by the state).
600. Edmonson, 500 U.S. at 621.
602. Id. at 351, 730 (defining the state authorization issue as one that revealed state action when states aggravated circumstances by prohibiting, permitting, or compelling a private entity to act in a particular manner); Tedesco, 18 Hastings Const. L.Q. at 240 (defining the state compulsion test as one that reveals state action when a state commands or encourages a private party's activity).
private party.\(^{604}\) Aggravation, then, became just one of many elements of state action that the *Edmonson* Court considered when analyzing the state's involvement in the challenged action.\(^{606}\)

While each of the tests modified by *Tarkanian* and *Edmonson* remained focused on the government's relationship with the challenged conduct, none required that the involvement be direct.\(^{606}\) Instead, the modified versions of the *Blum* Trilogy's tests examined the effects of an indirect relationship between the state and the challenged conduct.\(^{607}\) Neither *Tarkanian* nor *Edmonson* required that each of a state's contacts with a private entity tie directly to the specific challenged conduct.\(^{608}\) The Court's analyses in those opinions required only that the combined effect of those contacts affect the challenged conduct.\(^{609}\) *Tarkanian* and *Edmonson*, therefore, softened the rigidities of the state action tests enumerated in the *Blum* Trilogy.\(^{610}\)

**B. BRENTWOOD ACCORDING TO RECENT INTERPRETATIONS OF THE BLUM TRilogy**

The *Brentwood* Court could have determined TSSAA was a state actor without creating a "new" test.\(^{611}\) A proper application of the *Tarkanian* and *Edmonson* tests would have resulted in a finding of state action.\(^{612}\) In *Brentwood*, the Court recognized the *Blum* Trilogy's rigid state action tests and correctly determined that its state action analysis did not turn on application of those tests.\(^{613}\) However, the Court did not extend its analysis past the rigid tests as designed in the *Blum* Trilogy to apply recent modifications of those tests.\(^{614}\) Had the Court applied the modified state action tests, it could have classified TSSAA as a state actor without developing the purportedly "new" test of entwinement.\(^{615}\)

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604. *Id.*
605. *Id.*
606. *Id.* at 346, 351, 388, 410, 730.
607. *Id.* at 346, 351, 388, 405-06, 410, 730.
608. *Id.*
609. *Id.* at 388, 410.
610. *Id.* at 406.
611. *See infra* notes 649-70, 702-12, 738-56 and accompanying text.
612. *See infra* notes 649-70, 702-12, 738-56 and accompanying text.
613. *Brentwood*, 531 U.S. at 302-03 (defining the public function and state compulsion tests and referring to *Rendell-Baker*, one case in the *Blum* Trilogy); Culpepper, 35 U. RICH. L. REV. at 1181 (noting that the *Brentwood* Court stated that the public function and state compulsion tests did not apply to its analysis).
614. *Brentwood*, 531 U.S. at 302-03 (discussing the public function and state compulsion tests); Culpepper, 35 U. RICH. L. REV. at 1179-81 (noting that the *Brentwood* Court did not rely on *Tarkanian* for resolution of the state action issue).
615. *See infra* notes 649-70, 702-12, 738-56 and accompanying text.
1. The Brentwood Court's Discussion of the Traditional Symbiotic Relationship Test In Lieu of the Tarkanian Symbiotic Relationship Test

Analysis of the traditional symbiotic relationship test in *Rendell-Baker and Blum* focused on the state's role in a specific act as an isolated factor of state action.\(^{616}\) Alternatively, the *Tarkanian* Court's application of the symbiotic relationship test focused on the combined effect of all elements comprising a private party's symbiotic relationship with the state.\(^{617}\) In *Brentwood*, the Court discussed the *Tarkanian* analysis but did not apply the *Tarkanian* symbiotic relationship test in its analysis.\(^{618}\) Instead, the Court analyzed TSSAA's actions in a manner that resembled the rigid symbiotic relationship test utilized in *Rendell-Baker and Blum*.\(^{619}\) Because the *Tarkanian* symbiotic relationship test could have revealed state action, the Court, wanting to find state action in *Brentwood*, should have applied the *Tarkanian* test to examine the relationship between TSSAA and the State of Tennessee.\(^{620}\)

According to the traditional symbiotic relationship test, state action existed where a sufficiently close nexus existed between a private entity and the state, causing that state to become responsible for the private entity's conduct.\(^{621}\) The *Blum* Trilogy's cases noted that a symbiotic relationship existed where parties became interdependent or participated jointly in the challenged action.\(^{622}\) Although the *Brentwood* Court discussed the factors associated with the traditional symbiotic relationship test, it failed to address the traditional symbiotic relationship test as it applied to TSSAA.\(^{623}\)

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\(^{616}\) Buchanan, 34 Hous. L. Rev. at 405-06.

\(^{617}\) Id. at 410.

\(^{618}\) *Brentwood*, 531 U.S. at 297-98. In *Brentwood*, the Court discussed the factors commonly associated with the symbiotic relationship test as presented in the *Blum* Trilogy. Id. at 298-302. The Court discussed the *Tarkanian* case and noted the relevance of *Tarkanian* to the present case. Id. at 297-98. However, the Court found state action through entwinement. Id. at 302.

\(^{619}\) See infra notes 624-38 and accompanying text.

\(^{620}\) See infra notes 649-70 and accompanying text.


\(^{622}\) *Rendell-Baker v. Kohn*, 457 U.S. 830, 843 (1982) (indicating that a symbiotic relationship existed in cases where the parties depended on each other for financial support); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941 (1982) (stating that a private party's joint action with government officials in the challenged action sufficiently revealed state action); *Blum*, 457 U.S. at 1010-11 (rejecting a state action claim because joint action did not occur in an action the State would normally carry out).

\(^{623}\) *Brentwood*, 531 U.S. at 295-303. In *Brentwood*, the Court discussed the factors commonly associated with the traditional symbiotic relationship test as presented in the *Blum* Trilogy by discussing the interdependent nature of TSSAA's relationship with the State of Tennessee. Id. at 295, 297-302. However, the Court eventually held that state action existed through an alternative criterion labeled "entwinement." Id. at 291, 303.
In *Rendell-Baker*, the Court determined a symbiotic relationship did not exist between the state and a private school because the school’s receipt of financial benefits from the state did not affect its relationship with faculty members, even though the school relied heavily on state funding. The Court also determined the state and the school did not profit from each other’s involvement in the specific challenged conduct. The Court stated that even though the school depended on the state in certain matters, it did not profit from those funds by making termination decisions. The Court therefore determined that no symbiotic relationship existed between the school and the state.

Likewise, in *Blum*, the Court determined a private nursing home was not a state actor through application of the symbiotic relationship test because the state was not responsible for the nursing home’s challenged transfer decisions. The *Blum* Court determined the state did not act jointly with the nursing home in transferring the patients because neither heavy regulations nor extensive funding of nursing home operations revealed a symbiotic relationship between the state and the nursing home. The Court noted that the state did license and regulate the nursing home. However, the Court determined the state did not engage in state action through joint participation because the transfer of patients did not constitute an action that the state needed to provide. The Court reasoned that the state Constitution and Medicaid only provided for state funding of nursing homes, not for state-provided care in nursing homes. Because the patients challenged the nursing home’s decision to transfer patients and not the state’s funding duties, the Court determined no state action existed in the nursing home’s transfer decisions.

In *Brentwood*, TSSAA was not a state actor according to the symbiotic relationship test as applied in *Rendell-Baker* and *Blum* because TSSAA and the State of Tennessee did not depend on each other

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625. *Id.* at 843.
626. *Id.* at 840, 843.
627. *Id.*
628. Compare *Blum*, 457 U.S. at 1011 (determining a private nursing home was not a state actor because its acts were not attributable to the state), with *Rendell-Baker*, 457 U.S. at 843 (stating no symbiotic relationship existed between the state and the challenged act).
630. *Id.* at 1011.
631. *Id.* at 1010-11.
632. Schneider, 60 NOTRE DAME L. REV. at 1175.
633. *Blum*, 457 U.S. at 1010-11 (noting the state was not a joint participant in the nursing home’s actions); Schneider, 60 NOTRE DAME L. REV. at 1175 (stating that the *Blum* Court commented that the plaintiffs did not challenge the state’s funding).
when TSSAA sanctioned member schools. TSSAA did not rely on the State of Tennessee for any direct funding. Additionally, TSSAA's decision to sanction a private high school occurred independently of any involvement by the state or its officials in TSSAA's operations. Furthermore, no evidence existed to prove the State of Tennessee profited from TSSAA's decision to sanction its members. Thus, according to the traditional symbiotic relationship test, TSSAA was not a state actor when it punished Brentwood for violating TSSAA rules because no interdependent relationship existed between the state and TSSAA when TSSAA imposed sanctions on Brentwood.

The Brentwood Court, in trying to find state action, properly discarded an analysis of the traditional symbiotic relationship test because TSSAA was not a state actor according to that test. A symbiotic relationship did not exist between TSSAA and the State of Tennessee in regard to TSSAA's decision to sanction Brentwood Academy. The strictures of the traditional symbiotic relationship test required some connection between the state and the private entity's challenged act. Furthermore, like the school in Rendell-Baker, the State of Tennessee did not profit directly from TSSAA's punishment of Brentwood Academy.

However, the Court should not have referred to the traditional symbiotic relationship test presented in Rendell-Baker and Blum because the Tarkanian symbiotic relationship test would have yielded a result in accord with the Brentwood Court's finding of state action. The Brentwood Court incorrectly overlooked the Tarkanian Court's interpretation of the symbiotic relationship test. Because footnote thirteen ("footnote 13") of Tarkanian anticipated the presence of state

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634. Compare Blum, 457 U.S. at 1010-11 (noting the state was not responsible for a private nursing home's actions despite a relationship which encompassed state regulation and funding), and Rendell-Baker, 457 U.S. at 842-43 (stating a private school was not a state actor because the State did not profit from the school's termination of its faculty members), with Brentwood, 531 U.S. at 299 (noting TSSAA did not profit directly from member schools but instead from spectator admission fees at tournaments), and Brief for Respondent at 21, Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n., 531 U.S. 288 (2001) (No. 99-901) (noting that no evidence existed to indicate that the state profited from its relationship with TSSAA).

635. Brentwood, 531 U.S. at 299.


637. Id. at 21.

638. See supra notes 624-37 and accompanying text.

639. See supra notes 624-37 and accompanying text.

640. See supra notes 624-33 and accompanying text.

641. Schneider, 60 NOTRE DAME L. REV. at 1156.

642. Brief for Respondent at 19-21, Brentwood (No. 99-901).

643. See infra notes 649-70 and accompanying text.

644. See infra notes 649-70 and accompanying text.
action in situations similar to those in *Brentwood*, the Court should have used its recent interpretation of the traditional symbiotic relationship test to find state action. Footnote 13, which stated that state action would exist among an organization comprised mostly of public institutions located in the same state and created by the same sovereign, provided the *Brentwood* Court with a simple justification for finding state action in *Brentwood*. That justification existed because *Brentwood* featured TSSAA, an association of mostly public schools located entirely within the State of Tennessee. The *Brentwood* Court noted the relevance of footnote 13 but did not rely on the footnote when it found state action through a separate criterion it labeled “entwinement.”

In *Tarkanian*, the Court identified several factors that constituted the NCAA’s relationship with UNLV, a state institution that acted on behalf of the State of Nevada when it adopted the NCAA’s rules. However, in analyzing the State of Nevada’s role in the NCAA’s decision to direct UNLV to suspend Coach Tarkanian, the *Tarkanian* Court considered the combined force of all elements comprising a symbiotic relationship instead of directly applying each factor to the specific challenged act. The Court examined the NCAA’s collective membership and determined the NCAA received its authority from member institutions that acted independently of any certain state. The Court also examined UNLV’s decision to adopt NCAA policies and noted that UNLV voluntarily joined the NCAA and adopted its policies. The Court then noted that the NCAA maintained an adversarial relationship with UNLV when it represented its members and investigated UNLV. Because of that adversarial relationship, the Court noted the NCAA’s relationship with UNLV lacked the interdependence that could indicate state action. Finally, the Court noted that the NCAA held no governmental power to

645. *See infra* notes 659-70 and accompanying text. *See also Brentwood*, 531 U.S. at 298 (stating that the *Tarkanian* decision foreshadows the facts presented in *Brentwood*).
647. *Id.*
648. *Brentwood*, 531 U.S. at 297-98 (discussing *Tarkanian*’s holding and noting the relevance of footnote 13 but stating that the “specific holding” of *Tarkanian* did not affect the *Brentwood* Court’s finding of state action); Culpepper, 35 U. RICH. L. REV. at 1176 (stating that the *Brentwood* Court found footnote 13 persuasive in its analysis but did not rely on the footnote to resolve the state action issue).
652. *Id.* at 194-95.
653. *Id.* at 196.
654. *Id.* at 196 & n.16 (citing Polk County v. Dodson, 454 U.S. 312, 320 (1981)).
directly discipline Coach Tarkanian or any employee of a member school, but could only threaten to sanction the member itself.655 The Tarkanian Court considered the total impact of all of those factors in ultimately refusing to classify the NCAA as a state actor.656

In Tarkanian, the Court anticipated the facts presented in the Brentwood case and indicated that in such a situation, an organization would act under the color of state law.657 In noting that the NCAA received its power from members representing various states, the Court determined the NCAA acted independently of any state.658 However, in Tarkanian's footnote 13, the Court stated that it would reach a different result if an organization's membership consisted solely of institutions situated in the same state if many of the institutions were public in nature and established by the same sovereign.659 TSSAA was such an organization.660

Like the NCAA in Tarkanian, TSSAA in Brentwood derived its power from its collective membership, which elected TSSAA's legislative council.661 Like UNLV, Brentwood Academy voluntarily adopted TSSAA's policies.662 Additionally, Brentwood Academy's actions mirrored UNLV's actions when Brentwood Academy delegated its power to conduct investigations to TSSAA.663 However, unlike the NCAA, which acted independently of any certain state, TSSAA was not independent from the State of Tennessee; all of its members were located in the State of Tennessee and the Tennessee State Board of Education

655. Id. at 197.
656. Buchanan, 34 Hous. L. Rev. at 346, 408.
657. Tarkanian, 488 U.S. at 193 & n.13 (noting state action would occur when an organization's membership constituted mostly of institutions organized by the same sovereign and located solely within the same state). See Brentwood, 531 U.S. at 298 (stating Tarkanian foreshadowed the Brentwood case).
659. Id. at 193 n.13 (citations omitted). Footnote 13 states in part that "the situation would, of course, be different, if the membership consisted entirely of institutions located within the same State, many of them public institutions created by the same sovereign." Id.
660. See infra notes 661-70 and accompanying text.
661. Compare Tarkanian, 488 U.S. at 193 (stating that the NCAA, which oversaw the athletic activities of universities, was comprised of member schools and derived its power from its collective membership of those schools), with Brentwood, 531 U.S. at 291-92 (discussing the composition of TSSAA, which oversaw the athletic activities of member high schools that elected members of the legislative council, which served as TSSAA's rulemaking arm).
662. Compare Tarkanian, 488 U.S. at 194-95 (noting UNLV voluntarily belonged to the NCAA), with Brentwood, 531 U.S. at 291 (stating no member of TSSAA was forced to join TSSAA).
663. Compare Tarkanian, 488 U.S. at 195-96 (stating that because the member schools gave their right to enforce rules to TSSAA, which investigated Brentwood Academy, they delegated that duty), with Brentwood, 531 U.S. at 293, 299 (stating that TSSAA member schools, as arms of the state, gave their right to enforce rules).
("Board of Education") acknowledged the value of TSSAA within the state.664

Furthermore, the facts presented in Brentwood resemble the situation identified in footnote 13 of the Tarkanian decision, which stated that state action would exist where an association's membership consisted mostly of public schools located within one state and created by one sovereign.665 All TSSAA members were located within the State of Tennessee.666 The Tennessee State Constitution guarantees students the right to an education in free public schools, and Tennessee law provides for the operation of public schools in each Tennessee county.667 Furthermore, Tennessee law granted the Board of Education the power to develop public schools in Tennessee.668 Evidence proved that eighty-four percent of TSSAA's members were public institutions.669 In sum, the facts of the Brentwood case were virtually identical to the hypothetical occurrence of state action in footnote 13 of Tarkanian.670

The Brentwood Court should have applied the Tarkanian symbiotic relationship test in lieu of the traditional symbiotic relationship test because the Court could have found that TSSAA was a state actor under the Tarkanian symbiotic relationship test.671 To classify TSSAA as a state actor, the Brentwood Court did not need to look any further than footnote 13 of Tarkanian.672 While the Brentwood Court

664. Compare Tarkanian, 488 U.S. at 193 (stating the NCAA operated independently from any one state), with Brentwood, 531 U.S. at 291-93 (stating all TSSAA members were high schools located throughout the State of Tennessee and that the State Board of Education recognized the value of TSSAA).

665. See infra notes 666-69 and accompanying text. See also Tarkanian, 488 U.S. at 193 n.13 (noting that an organization would engage in state action if its members were mostly public institutions located entirely within one state and created by the same sovereign).


668. Brief for Petitioner at 10, Brentwood (No. 99-901).


670. Compare Tarkanian, 488 U.S. at 193 n.13 (stating that an association would become a state actor if its members were mostly public in nature, created by the same sovereign, and all located within the same state), with Brentwood, 531 U.S. at 291 (noting that TSSAA's members were located in Tennessee and mostly public), and Brief for Petitioner at 10, Brentwood (No. 99-901) (noting that under Tennessee state law, the Board of Education controlled Tennessee's public schools).

671. See supra notes 649-70 and accompanying text.

672. Compare Tarkanian, 488 U.S. at 193 n.13 (stating that state action would exist where an association's membership consisted mostly of public schools created by the same state and located in one state), with Brentwood, 531 U.S. at 288, 292-93 (stating that 84% of TSSAA members were public schools located in Tennessee and ruled by the State of Tennessee).
acknowledged footnote 13 and the Tarkanian state action analysis, it failed to apply that analysis to the facts presented in Brentwood.673

2. In Referring to the Traditional Public Function Test, the Brentwood Court Bypassed the Edmonson Public Function Test

In Brentwood, the Court should have addressed the Edmonson public function test instead of the traditional test because application of the Edmonson test would have resulted in a finding of state action.674 In Brentwood, the Court stated the issue did not turn on an analysis of the traditional public function test, which required the private entity to perform an act traditionally performed exclusively by the state.675 Consequently, the Court did not analyze TSSAA's actions according to the traditional public function test.676 Additionally, the Brentwood Court's public function discussion did not include the Edmonson public function test, which had discarded the exclusivity requirement.677 Had the Court addressed the Edmonson public function test, it would have been able to categorize TSSAA as a state actor under that test.678

TSSAA was not a state actor according to the strictures of the traditional public function test because TSSAA's imposition of sanctions on Brentwood Academy did not constitute a public function traditionally performed only by the State of Tennessee.679 In Rendell-Baker, the Supreme Court determined that a private school did not act on behalf of the state because it did not meet the requirements of the traditional public function test.680 In reaching that decision, the Court stated that a private entity's performance of a public function did not necessarily constitute state action.681 Instead, the Court commented that state action existed when the challenged conduct fulfilled the typically exclusive role of the state.682 The Rendell-Baker Court

673. See Brentwood, 531 U.S. at 291. The Court found state action through entwinement, not through an analysis of footnote 13 in Tarkanian. Id.
674. See infra notes 680-712 and accompanying text.
676. Id. at 291, 303. In Brentwood, the Court stated the state action analysis did not turn on analysis of the public function test but instead found state action through pervasive entwinement. Id. at 302-03.
677. See Brentwood, 531 U.S. at 303 (stating that the Court's decision did not turn on a public function test).
678. See infra notes 702-12 and accompanying text.
679. See infra notes 680-96 and accompanying text.
681. Id. The Court noted it found no evidence indicating the state's arrangement with the private entity constituted a sham arrangement that would allow the state to avoid its constitutional duties. Id. at 842 & n.7.
682. Rendell-Baker, 457 U.S. at 842 (citations omitted).
stated that such an exclusive state function did not exist in the case even though the education of troubled teens constituted a public function.\textsuperscript{683} The Court reasoned that state regulations only recently supported the education of maladjusted high school students unable to attend conventional public schools; such support was, therefore, not always the sole prerogative of the state but belonged to some other entity.\textsuperscript{684} Thus, the Court determined that the school's performance of a purported public function was not one that traditionally belonged solely to the state and therefore did not constitute state action according to the public function test.\textsuperscript{685}

Likewise, in \textit{Blum}, the Court determined that a nursing home's decision to transfer patients did not constitute state action because responsibility for that decision did not solely belong to the state.\textsuperscript{686} Noting that the state played no part in the nursing home's decision to transfer patients, the Court determined that the nursing home's decisions did not stem from any processes of the state.\textsuperscript{687} The state's response to the decisions did not constitute state action because the patients did not challenge the responsive acts.\textsuperscript{688} In emphasizing the statutory delegation of transfer decisions to private physicians that shared no relation with the state, the Court indicated that the only state involvement to be considered was that involvement related directly to the challenged conduct.\textsuperscript{689}

TSSAA was not a state actor under the traditional public function test because it did not perform a function that belonged exclusively to the state, even though its function traditionally belonged to the state.\textsuperscript{690} In 1995, the Board of Education amended its regulations and merely acknowledged the role of TSSAA as an organizer of high school athletic events.\textsuperscript{691} Like the school in \textit{Rendell-Baker}, TSSAA did not always receive express support from the state; the designation did not appear until 1972 and was revoked some twenty years later.\textsuperscript{692} Addi-
tionally, the State of Tennessee did not participate in TSSAA’s decision to sanction its member schools. Furthermore, students enjoyed no fundamental right to participate in extracurricular athletic activities and the State of Tennessee, therefore, was not obligated to perform that function for its high school students. While state law acknowledged the importance of TSSAA’s activities, it did not provide students with the constitutional right to engage in such events. TSSAA’s function, therefore, did not belong exclusively to the state because the state did not engage in TSSAA’s activities.

Because TSSAA’s ability to impose sanctions did not belong exclusively to the state, TSSAA was not a state actor under the traditional public function test. The state did not participate in TSSAA’s decision to sanction Brentwood Academy, and TSSAA was not a state actor when it punished the school. Furthermore, no evidence indicated that the duty of imposing sanctions belonged exclusively to the state. Thus, TSSAA’s decision to impose sanctions did not reveal state action through performance of a public function and the Court improperly referred to the traditional public function test as a result.

Instead, in wanting to find state action, the Court should have used the Edmonson Court’s interpretation of the public function test because TSSAA was a state actor under that test. In Edmonson, the Court defined the public function test as one that found state action when a private entity assumed a function that traditionally belonged to the state. In doing so, the Court discarded the requirement that only the state maintain the prerogative to perform a

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694. Id. at 18.
695. Brentwood, 531 U.S. at 292-93 (citation omitted) (acknowledging the importance of extracurricular athletic events among high schools); Brief for Respondent at 18, Brentwood (No. 99-901) (citations omitted) (stating the Tennessee State Constitution contained no provision that obligated the State to provide such events, thereby giving high school students the right to participate in those events).
697. See supra notes 680-96 and accompanying text.
698. Compare Blum, 457 U.S. at 1005, 1012 (stating the private nursing home reached the decisions to transfer patients according to medical profession standards not established by the State and that the State was not responsible for the decisions and ultimately not a state actor), with Brief for Respondent at 16-18, Brentwood (No. 99-901) (stating no evidence existed to prove the State of Tennessee participated in the sanctioning of Brentwood Academy, a function performed by TSSAA).
700. See supra notes 680-96 and accompanying text.
701. See infra notes 702-12 and accompanying text.
702. Edmonson, 500 U.S. at 624.
specific function.703 The Edmonson Court applied its public function test by examining a litigant's exercise of peremptory challenges to jury selections, which the Court characterized as a traditional government function because of the jury's quintessential governmental character.704 The Edmonson Court determined that state action existed because peremptory challenges constituted a traditional function of the government, even though such challenges were not exclusive functions of the government.705 By discarding the exclusivity element of the public function test, the Edmonson Court redefined the test in a manner that revealed state action in Leesville's exercise of its peremptory rights.706

In Brentwood, the Court could have determined that TSSAA was a state actor under the Edmonson public function test because TSSAA performed a traditional public function even though that function did not belong exclusively to the state.707 TSSAA traditionally performed a public function, as it was recognized by the Tennessee State Board of Education as the regulator of public secondary schools immediately upon its inception.708 By mandate of Tennessee state law, the State of Tennessee officially designated TSSAA as the regulator of athletic events among Tennessee's public schools for over twenty years just prior to Brentwood Academy's purported recruiting rule violations.709 Although the State of Tennessee revoked its designation of TSSAA in 1995, it continued to recognize TSSAA as the regulator of athletic events among Tennessee's public high schools.710 Traditionally, then, the State of Tennessee recognized TSSAA as the organizer of high school athletic events, and TSSAA performed a traditional function for the State of Tennessee as a result.711 Because TSSAA was, traditionally, the organizer of high school athletic events in the State of Tennessee, TSSAA was a state actor according to the Edmonson public function test.712

703. Buchanan, 34 Hous. L. Rev. at 388.
704. Edmonson, 500 U.S. at 624.
705. Id. at 624-25 (noting that the exercise of peremptory challenges constituted a traditional government function); Edmonson, 500 U.S. at 631, 640 (O'Connor, J., dissenting) (stating that peremptory challenges were not the exclusive function of the government).
706. Buchanan, 34 Hous. L. Rev. at 388.
707. See infra notes 708-12 and accompanying text.
710. Id. at 300-01.
711. Brentwood, 13 F. Supp. 2d at 681. The district court stated that through custom and practice, the State of Tennessee recognized TSSAA even after the designation was revoked. Id.
712. See supra notes 707-12 and accompanying text.
The Brentwood Court improperly ignored the Edmonson public function test because under that test, TSSAA became a state actor when it performed a function traditionally, though not exclusively, belonging to the State of Tennessee.\textsuperscript{713} Despite acknowledging the potential applicability of the traditional public function test, the Brentwood Court failed to apply the Edmonson public function test.\textsuperscript{714} Like the litigant's ability to exercise peremptory rights in Edmonson, TSSAA's decision to sanction Brentwood Academy did not traditionally belong \textit{only} to the state, but it did constitute a traditional function of the state.\textsuperscript{715}

3. \textbf{The Brentwood Court Referred To The Traditional State Compulsion Test But Did Not Address The Edmonson Court's Application Of The State Compulsion Test}

In Brentwood, the Court acknowledged the traditional state compulsion test, which found state action where a state significantly encouraged or compelled a private entity to perform the specifically challenged action.\textsuperscript{716} However, the Brentwood Court did not acknowledge or rely on the Edmonson state compulsion test, which applied the traditional state compulsion test as only one factor comprising a nexus between a state and a private entity.\textsuperscript{717}

The Brentwood Court, in looking for state action, should have applied the Edmonson state compulsion analysis.\textsuperscript{718} The Edmonson Court's application of the state compulsion test did not require that state compulsion occur in isolated incidents, but indicated that the test constituted one factor of the symbiotic relationship test.\textsuperscript{719} The Edmonson Court discussed elements of the traditional public function and state compulsion tests as factors of the second part of the \textit{Lugar} test, which asked whether a private entity could be characterized as a state actor.\textsuperscript{720} The Court therefore indicated the state compulsion test comprised just one factor in the state action analysis and no

\textsuperscript{713} See supra notes 702-12 and accompanying text.
\textsuperscript{714} See Brentwood, 531 U.S. at 302-03.
\textsuperscript{715} See supra notes 702-12 and accompanying text.
\textsuperscript{716} Brentwood, 531 U.S. at 300 n.3.
\textsuperscript{717} Id.
\textsuperscript{718} See infra notes 738-56 and accompanying text.
\textsuperscript{719} Buchanan, 34 Hous. L. Rev. at 346, 351, 730. The combined factors of the symbiotic relationship test first appeared as a basis for finding state action in Tarkanian. Id. at 346, 410.
\textsuperscript{720} Compare Edmonson, 500 U.S. at 621-26 (addressing the second part of the \textit{Lugar} test by acknowledging the overt, significant assistance of the court and the question of whether the exercise of a peremptory strike constituted a traditional government function), and \textit{Lugar}, 457 U.S. at 939, 941 (stating the test for state action was (1) whether the challenged action was rooted in state authority and (2) whether the private entity could be characterized as a state actor), \textit{with} Tedesco, 18 Hastings L.Q. at 241,
longer comprised an isolated test capable of revealing state action on its own. The Brentwood Court, in looking for state action, should have looked closer at the Edmonson state compulsion analysis because when combined with other factors of the symbiotic relationship test, that test revealed TSSAA was a state actor.

TSSAA would not qualify as a state actor under the traditional state compulsion test presented in Blum and Rendell-Baker. In Blum, the Supreme Court determined that a private entity's acquiescence to state involvement did not constitute state action. Rather, the Court commented that a private entity's acts became acts of the state when the state coerced or encouraged the conduct. The Court concluded the nursing home's transfer decisions occurred out of acquiescence to state procedures, not from the state's coercion of such procedures. In fact, the Court focused on the specific challenged act and determined that the state did not compel the nursing home to reach any specific decision to transfer patients. In Rendell-Baker, the Court rejected Rendell-Baker's arguments that state compulsion resulted from regulation of the private school. The Court determined the school's reliance on the state to provide ninety percent of its budget did not necessarily constitute state compulsion because such funding did not coerce the school's decision to discharge the teachers. Thus, in Rendell-Baker, the Court advanced the proposition that regulated private acts only revealed state compulsion if the regulations directly compelled the very conduct in question.

TSSAA also acted without express authority from the Board of Education. Originally, the Board of Education had officially designated TSSAA as an organization dedicated to establishing and regulating interscholastic athletic events. In 1995, however, the State Board of Education removed its designation to recognize TSSAA's role in organizing athletic events for high schools in Tennessee. The

242 (defining the public function test as one that examined the powers traditionally exclusively reserved to the State).
721. Buchanan, 34 Hous. L. Rev. at 388.
722. See infra notes 738-56 and accompanying text.
723. See infra notes 724-36 and accompanying text.
724. Blum, 457 U.S. at 1004, 1010.
725. Id. at 1004.
726. Id. at 1010.
727. Id.
729. Id. at 832, 840-41.
730. Schneider, 60 Notre Dame L. Rev. at 1156.
731. Brentwood, 531 U.S. at 292-93 (citation omitted).
732. Id. at 292 (citation omitted).
733. Id. at 292-93 (citation omitted). See supra note 41 and accompanying text (explaining the discrepancies in the date of designation).
state's acknowledgment of TSSAA's duty to organize high school athletic events did not require TSSAA to impose sanctions, but merely recognized TSSAA's role in coordinating competitions. 734 Additionally, TSSAA generated its revenue from gate receipts at athletic tournaments and did not directly receive most of its funding from the state. 735 Like the school in Rendell-Baker, TSSAA was not a state actor under the traditional state compulsion test because it was not required by the State of Tennessee to sanction member schools. 736

However, TSSAA was a state actor according to the recent Edmonson state compulsion test, and the Brentwood Court, in looking for state action, could have looked closer at the Edmonson Court's modified state compulsion test. 737 In Edmonson, the Court indicated state action existed when a state aggravated the effect of a challenged action. 738 The Court explained that the government aggravated an action when it allowed the act to take place in an official forum. 739 The Edmonson Court found the requisite aggravation through jury selection and an exercise of peremptory challenges that occurred in the courthouse, a sufficiently official forum. 740

The Edmonson Court applied state compulsion not as an isolated indicator of state action, but as one factor in its symbiotic relationship analysis. 741 In Edmonson, the Court did not find state action solely because the government participated in the exercise of peremptory challenges inside a courthouse. 742 Instead, the Court determined the state aggravated the effect of the peremptory challenges in a manner that comprised one point of contact in the symbiotic relationship analysis. 743 When the Court considered the aggravation factor with other factors of the state's relationship with the litigant in its examination of peremptory strikes, it determined that the total impact of all contacts between the government and the private litigant revealed state action. 744 Thus, the Edmonson state compulsion test did not serve as

734. Id. at 309-10 (Thomas, J., dissenting).
735. Brentwood, 531 U.S. at 291.
736. Compare Rendell-Baker, 457 U.S. at 833, 841-42 (noting that regulations affected the school generally but commenting that the state did not compel the school to discharge faculty members), with Brentwood, 531 U.S. at 292-93 (noting that the State Board of Education officially recognized TSSAA's role and allowed schools to voluntarily join TSSAA but did not recognize TSSAA as an official regulator).
737. See infra notes 738-56 and accompanying text.
738. Edmonson, 500 U.S. at 621-22 (citations omitted).
739. Id. at 628.
741. Id. at 388.
742. Edmonson, 500 U.S. at 622 (citations omitted). The Court based its finding of state action on its analysis of three principles of state action. Id.
744. Id. at 386-89, 730.
an isolated indicator of state action, but merely comprised one portion of the symbiotic relationship test.\textsuperscript{745}

In \textit{Brentwood}, the State of Tennessee did not compel TSSAA to sanction Brentwood Academy for violating the recruiting rule.\textsuperscript{746} The State did not aggravate Brentwood Academy's situation when TSSAA sanctioned the school and purportedly violated the school's First Amendment rights; initially, TSSAA did not find Brentwood Academy guilty of violating recruiting rules at an official hearing but instead notified the school via mail.\textsuperscript{747} As the State Board of Education revoked its official designation of TSSAA prior to TSSAA's decision to sanction Brentwood Academy, the State of Tennessee did not compel TSSAA to act as it did.\textsuperscript{748} Thus, unlike the government in \textit{Edmonson}, the State of Tennessee did not encourage TSSAA to sanction Brentwood Academy.\textsuperscript{749}

However, the \textit{Edmonson} state compulsion analysis, which the \textit{Edmonson} Court applied as one factor of the symbiotic relationship test, would have indicated TSSAA was a state actor.\textsuperscript{750} TSSAA was a state actor under the \textit{Tarkanian} Court's symbiotic relationship test, and when combined with other factors of the symbiotic relationship, the state compulsion factor supports a finding that TSSAA acted on behalf of the State of Tennessee when it sanctioned Brentwood Academy.\textsuperscript{751} The combined weight of all elements related to the symbiotic relationship test sufficiently constituted state action by TSSAA.\textsuperscript{752} Any encouragement, coercion, or aggravation caused by the state's acknowledgment of TSSAA constituted only one of the factors that comprised the relationship through which state action existed.\textsuperscript{753} The State of Tennessee did not directly aggravate the effect of TSSAA's

\begin{footnotes}
\item[745] Id. at 346, 351, 388, 730.
\item[746] See infra notes 747-49 and accompanying text.
\item[747] Compare \textit{Edmonson}, 500 U.S. at 628 (stating the government aggravated and made worse the effects of the discriminatory strikes because it allowed them to occur in the courthouse, an official forum), \textit{with Brentwood}, 13 F. Supp. 2d at 676-77 (noting TSSAA notified Brentwood Academy of its violations in a letter before any hearings were held).
\item[748] \textit{Brentwood}, 531 U.S. at 292-93 (stating the Board of Education revoked its official designation); \textit{Id.} at 310 (Thomas, J., dissenting) (noting the State did not compel TSSAA to enforce its recruiting rule).
\item[749] Compare \textit{Brentwood}, 531 U.S. at 292-93 (noting the State of Tennessee did not compel or encourage TSSAA's actions), \textit{with Buchanan}, 34 \textit{Hous. L. Rev.} at 351, 730 (noting that the \textit{Edmonson} Court determined that the government aggravated the private counsel's actions because the acts occurred in a courthouse, an official forum).
\item[750] See infra notes 751-56 and accompanying text.
\item[751] See supra notes 649-70 and accompanying text.
\item[752] See supra notes 649-70 and accompanying text.
\item[753] Compare \textit{Buchanan}, 34 \textit{Hous. L. Rev.} at 346, 351, 730 (stating the \textit{Edmonson} Court applied the state compulsion test as one component of the symbiotic relationship test), \textit{with Brentwood}, 531 U.S. at 291, 293 (defining TSSAA as a nonprofit coordinator of high school sports in Tennessee and Brentwood Academy as a private institution).
\end{footnotes}
sanctions, but many of its high school administrators took part in the sanctioning process. When considered along with footnote 13 and other contacts between the state and TSSAA, the state’s participation in the sanctioning process constituted state action. Thus, an analysis of TSSAA's activities under the Edmonson state compulsion analysis would likely result in a finding of state action because the state compulsion analysis is a factor of the symbiotic relationship test and TSSAA was a state actor under the Tarkanian symbiotic relationship test.

In Blum, the Court identified the traditional symbiotic relationship, public function, and state compulsion tests as requirements for state action. The traditional symbiotic relationship test revealed state action when a close nexus resulting from joint participation or interdependence transformed private actions into actions of the state. An analysis of the traditional public function test revealed state action when a private entity performed a function traditionally belonging exclusively to the state. The state compulsion test revealed state action when a state compelled a private entity to act in a certain manner. A private actor became a state actor in Blum when an analysis of just one of the tests found state action in the specifically challenged conduct.

However, the Court eventually modified its application of the tests to include a totality approach that weighed the combined force of all elements of each test. The symbiotic relationship test eventually required only that all relevant factors indicate the presence of state action through a symbiotic relationship. The public function test eventually discarded the exclusivity requirement and examined traditional government functions. The state compulsion test, traditionally a factor capable of revealing state action on its own, became a

See supra notes 649-70 and accompanying text (indicating TSSAA was a state actor under the Tarkanian symbiotic relationship test).

754. Brentwood, 531 U.S. at 291.
755. See supra notes 649-70 and accompanying text.
756. See supra 649-70, 738-55 and accompanying text (stating TSSAA was a state actor under the symbiotic relationship test). See also Buchanan, 34 Hous. L. Rev. at 346, 351, 730 (stating the Edmonson Court applied the state compulsion test as a factor of the symbiotic relationship test).
757. Mawdsley, 154 EDUC. LAW REP. at 981-82.
758. Tedesco, 18 HASTINGS CONST. L.Q. at 242-43.
759. Id. at 241-42.
760. Id. at 240.
762. Id. at 758.
763. Id. at 346, 410.
764. Id. at 388.
mere factor of the symbiotic relationship test.\textsuperscript{765} When modified, each of the traditional state action tests examined more contacts between the state and a private entity than they had when originally introduced in the \textit{Blum} Trilogy.\textsuperscript{766} Thus, courts could rely on modified versions of the tests to find state action by examining factors not previously included in state action analyses.\textsuperscript{767}

**C. THE BRENTWOOD COURT ULTIMATELY DISCARDED THE BLUM TRILOGY’S STATE ACTION TESTS AND FOUND STATE ACTION THROUGH PERVERSIVE “ENTWINEMENT,” WHICH RESEMBLES THE COURT’S PREVIOUS “ENTANGLEMENT” TEST**

1. **Entwinement**

After the \textit{Blum} Trilogy, courts recognized the symbiotic relationship, public function, and state compulsion tests as the three judicially accepted theories for finding state action.\textsuperscript{768} However, the Supreme Court ignored those theories in \textit{Brentwood}, even though it could have found state action by using the most recent interpretations of the \textit{Blum} Trilogy’s state action tests.\textsuperscript{769} Although modified versions of the state action tests examined the combined effect of all factors, the Court did not rely on those traditional tests when it classified TSSAA as a state actor through entwinement.\textsuperscript{770}

The entwinement test resembles theories advanced by the Court before it contracted the state action doctrine in the \textit{Blum} Trilogy.\textsuperscript{771} Although the \textit{Brentwood} Court did not define “entwinement,” it examined the string of entwined relationships that existed between TSSAA and the State of Tennessee.\textsuperscript{772} Specifically, the Court identified elements of those relationships that created an overlapping identity between the state and TSSAA.\textsuperscript{773} The Court determined that entwinement existed after noting that eighty-four percent of TSSAA’s members were public schools and that public school officials served on

\textsuperscript{765} \textit{Id.} at 346, 351, 730 (stating that the \textit{Edmonson} Court analyzed the state compulsion test as a factor of the symbiotic relationship test); Martin A. Schwartz, \textit{Pervasive Entwinement Muddies State Action Waters}, N.Y. L.J., June 19, 2001 at 3 (noting that Supreme Court precedent indicates the state compulsion test once served as an isolated indicator of state action).

\textsuperscript{766} Buchanan, 34 Hous. L. Rev. at 388, 406, 410.

\textsuperscript{767} See Buchanan, 34 Hous. L. Rev. at 388, 410, 730, 758.

\textsuperscript{768} Mawdsley, 154 Educ. Law Rep. at 982.

\textsuperscript{769} See supra notes 624-756 and accompanying text.

\textsuperscript{770} \textit{Brentwood}, 531 U.S. at 291, 299, 300 & n.3, 303 (finding state action through entwinement and denouncing other state action tests); Buchanan, 34 Hous. L. Rev. at 410, 758 (stating the \textit{Tarkanian} and \textit{Edmonson} tests examined the total combined effect of all factors).

\textsuperscript{771} See infra notes 797-828 and accompanying text.

\textsuperscript{772} Culpepper, 35 U. Rich. L. Rev. at 1183-84.

\textsuperscript{773} \textit{Brentwood}, 531 U.S. at 303.
TSSAA's governing councils. Additionally, the Court considered the availability of state retirement funds to TSSAA employees as indicative of an overlapping relationship that lead to state action through entwinement. The Court considered the total affect of such factors when examining the overlapping identities of TSSAA and the State of Tennessee.

In examining the total impact of the contacts that formed the overlapping relationship between the state and TSSAA, the Brentwood Court applied its entwinement test much as it had applied its entanglement test that prevailed before the Blum Trilogy. Both tests examined the totality of circumstances surrounding the state's relationship with a private entity with no regard to the specific challenged action. Additionally, both entwinement and entanglement indicated that a state's indirect involvement in private actions could convert the private acts into those of the state, with little, if any, consideration of the state's direct involvement in the specific challenged conduct.

The Brentwood entwinement test resembled the entanglement acknowledged by the Court in Burton v. Wilmington Parking Authority, which also examined the relationship formed through various contacts between the state and a private entity. In Burton, the Court considered the state's ownership of the restaurant and the restaurant's dependence on the state's facility to provide parking for its customers as indicative of state action. The Burton Court reasoned that the state's reliance on the restaurant's rents and long-term lease contributed to the mutually beneficial relationship that revealed the presence of entanglement.

In a similar analysis that took place in

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774. Id. at 291.
775. Id. at 300, 303 (noting that TSSAA employees are eligible for retirement benefits available to state employees and that entwinement resulted from overlapping identities of the state and TSSAA); Culpepper, 35 U. RICH. L. REV. at 1184 (stating that the eligibility of TSSAA's employees in the state retirement fund was an element of entwinement).
777. See infra notes 797-828 and accompanying text.
778. Id.
779. Compare Riguera, 44 U. MIAMI L. REV. at 209-11 (noting that prior to the Blum Trilogy, a state's indirect relationship with a private entity could lead to a finding of state action even if no direct contact with the specific challenged conduct existed), with Brentwood, 531 U.S. at 303 (stating that no one criterion lead to a finding of state action through entwinement, which actually considered the total effect of various criteria).
783. Compare Burton, 365 U.S. at 723-24 (noting the state's reliance on receipt of Eagle's rents that contributed to a mutually beneficial relationship), and Culpepper, 35 U. RICH. L. REV. at 1171-72 (commenting that the Burton Court employed a totality approach to its state action analysis), with GUNThER & SULLIVAN, supra note 560 at 927,
St. Augustine, the Fifth Circuit applied the entanglement theory of state action.\textsuperscript{784} Upon examining the relationship between LHSAA and the State of Louisiana, the Fifth Circuit determined the state was involved in LHSAA activities and declared LHSAA a state actor.\textsuperscript{785}

Three years later, \textit{Lemon v. Kurtzman}\textsuperscript{786} applied a similar entanglement test in an Establishment Clause analysis and declared two state statutes unconstitutional.\textsuperscript{787} Just as the Fifth Circuit identified multiple factors of the parties' relationship when it analyzed a state action claim, the Supreme Court in \textit{Lemon} found excessive entanglement by examining the contacts of the relationship between the states and private schools.\textsuperscript{788} Specifically, the Court determined that entanglement existed through the combined effect of the state's surveillance and control of education in private schools as well as the state's access to private schools' financial records.\textsuperscript{789} Like the Burton Court, the Lemon Court examined the total effect of contacts between the state and private entities when conducting its entanglement analysis.\textsuperscript{790}

When the Supreme Court created its entwinement test in \textit{Brentwood}, it applied loosely structured analyses similar to those presented in pre-\textit{Blum} Trilogy state action theories.\textsuperscript{791} Prior to \textit{Blum}, the Court did not analyze state action claims by examining the specific conduct in question.\textsuperscript{792} Instead, the pre-\textit{Blum} Court examined the totality of circumstances surrounding relationships of states and private entities when determining whether such relationships resulted in state action.\textsuperscript{793} Likewise, in \textit{Brentwood}, the Court employed its entwinement

\textsuperscript{784} \textit{St. Augustine}, 396 F.2d at 227-28.
\textsuperscript{785} \textit{Lemon}, 403 U.S. at 602 (1971).
\textsuperscript{786} \textit{Lemon} v. Kurtzman, 403 U.S. 602, 606, 615 (1971).
\textsuperscript{787} \textit{St. Augustine}, 396 F.2d at 227-28.
\textsuperscript{788} \textit{Compare St. Augustine}, 396 F.2d at 227-28 (identifying various factors that contributed to LHSAA's relationship with the State of Louisiana), \textit{with Mawdsley, 154 Educ. Law Rep.} at 996 (stating that \textit{Lemon} applied an entanglement analysis that examined contacts between a state and a private entity).
\textsuperscript{789} \textit{Lemon}, 403 U.S. at 606, 615, 624-25.
\textsuperscript{790} \textit{Compare Burton}, 365 U.S. at 723-24 (examining various contacts between the state and the private restaurant), \textit{and Gunther & Sullivan, supra} note 560, at 927, 946 (13th ed., 1997) (stating that the Burton Court's analysis employed the entanglement theory of state action), \textit{with Mawdsley, 154 Educ. Law Rep.} at 996 (noting that \textit{Lemon} employed the entanglement test by identifying various contacts between the state and private schools).
\textsuperscript{791} See infra notes 797-828 and accompanying text.
\textsuperscript{792} Schneider, 60 Notre Dame L. Rev. at 1156.
\textsuperscript{793} Buchanan, 34 Hous. L. Rev. at 758.
test to analyze the effect of all factors that created an overlapping identity between the state and TSSAA. The Brentwood entwinement test, which analyzed factors unrelated to the specific conduct in question, resembled pre-Blum state action theories.

2. The Entwinement Analysis Marked a Return to Early Entanglement Theories of State Action

The entwinement theory resembled the entanglement theory of state action that examined the totality of contacts between parties prior to the Blum Trilogy. In Burton, the Court examined the cumulative weight of each contact between the state and Eagle, a restaurant. The Court relied on the combined weight of all relevant contacts between the parties in concluding that Eagle had acted on behalf of the state. The Burton Court determined state action existed because (1) the state owned the parking facility; (2) Eagle entered into a long-term lease to operate in the building; and (3) the state depended on Eagle's customers for revenue from its parking garage. Additionally, the Court noted that the property leased to Eagle constituted an integral portion of the state's ability to operate its parking garage. However, the Court did not consider any factor as isolated proof of state action. Instead, the Court considered the combined weight of relevant factors that placed both parties in a position of interdependence and found state action without regard to the challenged discriminatory conduct.

Then, in 1968, the Fifth Circuit applied the entanglement theory as it analyzed a high school's state action claim in St. Augustine. The Fifth Circuit's entanglement analysis identified several contacts between the State of Louisiana and LHSAA, such as (1) the largely public membership of LHSAA; (2) the ability of LHSAA staff to claim

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794. Compare Buchanan, 34 Hous. L. Rev. at 758 (defining the totality approach as a weighing of the importance of each contact between the private action and the government and then analyzing the total mix), with Brentwood, 531 U.S. at 295-303 (discussing the importance of contacts between State officials and TSSAA while assessing the overlapping identity and applying various criteria).
795. See infra notes 797-828 and accompanying text.
796. Compare Buchanan, 34 Hous. L. Rev. at 758 (noting the Burton Court employed a totality analysis of state action that considered the combined weight of all factors), with Brentwood, 531 U.S. at 303 (stating entwinement is based on a finding of an overlapping identity comprised of multiple criteria).
797. Buchanan, 34 Hous. L. Rev. at 395, 758.
798. Id. at 395-97.
800. Id.
801. Buchanan, 34 Hous. L. Rev. at 397.
state retirement benefits; and (3) the dependence of LHSAA on funding from public sources.\textsuperscript{804} Three years later in \textit{Lemon}, the Supreme Court further utilized an entanglement theory to examine contacts between church and state.\textsuperscript{805} The \textit{Lemon} Court held state laws that financially supported teachers in religious schools were unconstitutional due to excessive entanglement between the state and the religious institutions.\textsuperscript{806} In deciding whether the entanglement exceeded permissive levels, the Court examined the character and intentions of the benefited institutions, the nature of state aid, and the resulting relationship between a religious entity and the state.\textsuperscript{807} The Court determined excessive entanglement existed because (1) state surveillance of parochial school teachers; (2) the requirement that supplemented teachers at religious schools observe restrictions placed on teachers at secular institutions; and (3) the state's examination of financial records to determine which expenses related to religious activities.\textsuperscript{808}

The \textit{Lemon} Court's analysis did not focus specifically on the government's decision to financially supplement teachers or the manner in which the government acted to provide the supplements, which were challenged by the plaintiffs.\textsuperscript{809} Instead, the Court noted that an entanglement analysis depended on an examination of all circumstances that created a relationship between the church and a state.\textsuperscript{810} The Court's analysis concentrated on the characteristics of schools that benefited from the funding provided by the statutes as well as the relationship between the states and religious entities that resulted from state aid to private schools.\textsuperscript{811} Because the funding caused identities of the states and the schools to overlap such that no clear distinction existed between religion and government, the Court determined that entanglement existed.\textsuperscript{812} Such determination resulted from the Court's examination of the total effects of the myriad of contacts that created the state's relationship with parochial schools.\textsuperscript{813}

\begin{itemize}
\item \textsuperscript{804} \textit{St. Augustine}, 396 F.2d at 227-28.
\item \textsuperscript{805} Mawdsley, 154 \textit{Educ. L. Rep.} at 996.
\item \textsuperscript{806} \textit{Lemon}, 403 U.S. at 606-07, 609.
\item \textsuperscript{807} Mawdsley, 154 \textit{Educ. L. Rep.} at 996.
\item \textsuperscript{808} Id.
\item \textsuperscript{809} \textit{Compare Lemon}, 403 U.S. at 627 (stating entanglement existed between the state and religion), \textit{with} Mercadal, 6 \textit{Sports Law. J.} at 118 (distinguishing between entanglement and the state action tests used in the \textit{Blum} Trilogy that focused on the specific challenged act).
\item \textsuperscript{810} \textit{Lemon}, 403 U.S. at 614.
\item \textsuperscript{811} Id. at 615.
\item \textsuperscript{812} Id. at 618-20.
\item \textsuperscript{813} Id. at 615-22.
\end{itemize}
In *Brentwood*, the entwinement test also examined the overlapping identity of TSSAA and the State of Tennessee.\(^{814}\) Like the entanglement theories used in *Burton, St. Augustine*, and *Lemon*, the *Brentwood* entwinement test examined the relationship formed through various contacts between TSSAA and the State of Tennessee.\(^{815}\) According to the Court, entwinement resulted in an overlapping of identities evidenced by an analysis of various contacts between the two parties.\(^{816}\) Specifically, the *Brentwood* Court found state action through entwinement of public officials in TSSAA’s composition and activities, noting the presence of public school principals and superintendents on TSSAA governing board.\(^{817}\) Just as the *Lemon* entanglement test examined the constitutionality of the state’s ability to fund private, religiously affiliated schools and their teachers under the First Amendment, the entwinement test examined the state’s purported funding of TSSAA through public schools’ membership dues and gate receipts at events attended by the general public.\(^{818}\) The *Brentwood* Court also noted that TSSAA employees enjoyed retirement benefits offered to employees of the State of Tennessee.\(^{819}\) The *Brentwood* entwinement theory indicated that the power of state entities to fund private organizations may sufficiently constitute state action.\(^{820}\)

In finding an overlapping identity, the *Brentwood* entwinement test also resembled the entanglement test by evaluating the totality of facts surrounding TSSAA’s relationship with the State of Tennessee.\(^{821}\) However, the Court did not examine the state’s direct involvement in TSSAA’s decision to sanction Brentwood Academy as it found state action.\(^{822}\) Like the Courts in *Burton, St. Augustine*, and *Lemon*,

\(^{814}\) *Brentwood*, 531 U.S. at 303.

\(^{815}\) Mawdsley, 154 EDUC. L. REP. at 996.

\(^{816}\) *Brentwood*, 531 U.S. at 303.

\(^{817}\) Id. at 298.

\(^{818}\) Compare *Lemon*, 403 U.S. at 611-22 (examining the state’s power to fund schools), with *Brentwood*, 531 U.S. at 299 (examining TSSAA’s reliance on funding from public schools).

\(^{819}\) Id. at 300.

\(^{820}\) Mawdsley, 154 EDUC. L. REP. at 995.

\(^{821}\) Compare Buchanan, 34 HOUSE. L. REV. at 758 (defining the totality approach as one that looks at various factors comprising a relationship and evaluating them together while weighing their effect), with *Brentwood*, 531 U.S. at 296-303 (examining various factors comprising the relationship between the parties, noting the significance of multiple criteria in finding state action through entwinement).

\(^{822}\) Compare Blum, 457 U.S. at 1010-11 (rejecting a state action plan after noting the State did not affect the nursing home’s transfer decisions despite the regulations and funding that impacted activities at the nursing home), with Schneider, 60 NOTRE DAME L. REV. at 1156 (stating the *Blum* test required a direct relationship to the challenged conduct), and *Brentwood*, 531 U.S at 299-301, 303 (discussing the regulations and funding that impacted TSSAA’s organization but finding state action after using such factors as elements of state action analyses that considered multiple criteria).
the Brentwood Court emphasized that finding state action through entwinement relied on a fact-bound inquiry.\textsuperscript{823}

The Court then noted that public school officials who served on TSSAA governing councils provided TSSAA with the necessary mechanisms by which they regulated athletic tournaments.\textsuperscript{824} That decision resembled those handed down by decisions in Burton, St. Augustine, and Lemon, which also determined that governmental entities provided the mechanisms by which entanglement existed.\textsuperscript{825} Those determinations occurred as the Supreme Court noted state ownership of the parking garage that Eagle operated in Burton, the statutes that controlled teaching at parochial schools in Lemon, and the Fifth Circuit's acknowledgment of the largely public voting membership of LHSAA in St. Augustine.\textsuperscript{826} The Court determined that the relevant facts created an overlapping identity between the state and TSSAA that constituted state action through entwinement.\textsuperscript{827} Thus, the entwinement test resembled early state action theories that considered the totality of all relevant factors and marked a return to those theories.\textsuperscript{828}

The Brentwood entwinement test recalled analyses employed by the entanglement test as used before the Blum Trilogy introduced the symbiotic relationship, public function, and state compulsion tests.\textsuperscript{829} Both tests examined the nature of contacts between the state and a private entity without specifically focusing on the state's involvement in the challenged conduct.\textsuperscript{830} Additionally, both theories acknowl-

\textsuperscript{823} Compare Burton, 365 U.S. at 724-25 (noting that the facts, when considered together, indicated state action existed), and Lemon, 403 U.S. at 614 (stating that the entanglement analysis depended on an examination of all circumstances), with Brentwood, 531 U.S. at 298 (noting the necessity of a fact-bound inquiry in analyzing state action).

\textsuperscript{824} Brentwood, 531 U.S. at 299.

\textsuperscript{825} Compare Brentwood, 531 U.S. at 299 (noting that TSSAA provided a mechanism for Tennessee high schools to operate), with Lemon, 403 U.S. at 620 (stating that the statutes created described the control that the states would have over participating parochial schools), and Burton, 365 U.S. at 724-25 (commenting on the fact that the state owned the garage that allowed Eagle to provide its customers with parking), and St. Augustine, 396 F.2d at 227-28 (noting that LHSAA consisted mostly of public schools).

\textsuperscript{826} Lemon, 403 U.S. at 620 (noting that state statutes dictated the manner in which teaching at parochial schools would occur); Burton, 365 U.S. at 724-25 (commenting that the State of Delaware owned the building in which Eagle operated); St. Augustine, 396 F.2d at 227-28 (stating that LHSAA was comprised mostly of public schools).

\textsuperscript{827} Brentwood, 531 U.S. at 303.

\textsuperscript{828} See supra notes 797-827 and accompanying text.

\textsuperscript{829} See supra notes 781-827 and accompanying text.

\textsuperscript{830} Brentwood, 531 U.S. at 302-03 (rejecting analyses of the state action tests that focused on the specific challenged conduct); Mawdsley, 154 EDUC: LAW REP. at 996 (stating both tests examined the nature of contacts comprising the relationship).
edged the state’s power to fund private entities.\textsuperscript{831} The entwinement test, therefore, resembles the entanglement test for state action because both examined the nature of all contacts between a state and a private entity.\textsuperscript{832} Consequently, the entwinement test is not a “new” test for state action, but a refashioned entanglement test that ultimately served as a vehicle by which the Court discarded modifications of Blum Trilogy’s tests.\textsuperscript{833}

CONCLUSION

In Brentwood Academy v. Tennessee Secondary School Athletic Ass’n,\textsuperscript{834} the United States Supreme Court introduced a criterion of state action analyses that resembled theories that prevailed before the Court released its Blum Trilogy. The Court determined that TSSAA acted on behalf of the State of Tennessee when it imposed sanctions on Brentwood Academy.\textsuperscript{835} The Court reached that decision by disregarding recent interpretations of state action questions and creating a new criterion based solely on pervasive entwinement.

In Brentwood, the Court properly classified TSSAA as a state actor. Although TSSAA was not a state actor under the rigid applications of the Blum trilogy’s principles, it was a state actor according to recent modifications of the symbiotic relationship, public function, and state compulsion tests. Those modifications appeared in National Collegiate Athletic Ass’n v. Tarkanian\textsuperscript{836} and Edmonson v. Leesville Concrete Co.,\textsuperscript{837} which laid the groundwork for analyses of situations exactly like the one presented in Brentwood. Nevertheless, the Brentwood Court declined to find state action through the analyses presented in Tarkanian and Edmonson and instead found state action through pervasive entwinement. By creating the entwinement criterion, the Court ignored precedent and established a criterion that resembled state action theories prevalent prior to the Blum Trilogy. Thus, the Court abandoned its established state action doctrine to return to its theories of the past.

In today’s litigious-oriented society, a rigid state action doctrine provides necessary boundaries for lawsuits brought by individuals against private entities acting for the state. In the past, strict applications of the traditional symbiotic relationship, state compulsion, and

\begin{itemize}
\item \textsuperscript{831} See supra notes 799, 804, 808 and accompanying text.
\item \textsuperscript{832} See supra notes 797-827 and accompanying text.
\item \textsuperscript{833} See supra notes 797-827 and accompanying text.
\item \textsuperscript{834} 531 U.S. 288 (2001).
\item \textsuperscript{836} 488 U.S. 179 (1988).
\item \textsuperscript{837} 500 U.S. 614 (1991).
\end{itemize}
public function tests limited the number of civil rights lawsuits brought in federal courts. By finding state action through the overly inclusive entwinement test, the Supreme Court did not create a new state action test; instead, the Court provided attorneys with judicially acceptable means of circumventing traditionally rigid state action analyses. As a result, civil rights plaintiffs may now rely on the expansive state action theories that prevailed before 1982, when the Court used the *Blum* Trilogy to contract its state action doctrine.

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